IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1978

~~78-392~~

DR. HAROLD TRACY, et ux.; BIG BEND COMMUNITY COLLEGE, et al.,

Petitioners,

v.

ROGER R. RUTCOSKY and ROBERTA RUTCOSKY, husband and wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

SLADE GORTON,
Attorney General

EDWARD B. MACKIE,
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

FCR
BRIEF

Yes could you
Give me the date of
the WSupCt decision — it
must be on the opinion —
Thanks
Sheila

Supreme Court Review

Petition Filed:

Contingent Fees--Appropriated Funds—Ruling Below (WashSupCt., 1/ /78):
A community college's payment of a percentage fee to an individual who had prepared a proposal under which the college was to provide educational services for Army personnel that was contingent upon the Army's accepting the propsal isn't barred by 10 U.S.C. §2306(b), which requires contractors to warrant that their contracts were not obtained under a contingent fee agreement; 10 U.S.C. §2306(b) isn't applicable since the college wasn't paid from money appropriated to the Army, but rather by assignment of individual soldiers' Veterans Administration benefits directly to the college.

Question presented: Does the prohibition against contingent fee arrangements contained in 10 U.S.C. §2306(b) apply to an agreement to provide educational services to the United States Army, pursuant to the Pre-Release Discharge Program authorized in 38 U.S.C. §1695-1698, through which tuition and fees are funded by Veterans Administration benefits assigned to a college by matriculated military personnel? (Big Bend Community College v. Ritzenhoff Rutcosky, Sup. Ct. No. 78-392, 9/7/78)

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JURISDICTIONAL STATEMENT

Petitioner, BIG BEND COMMUNITY COLLEGE, an agency of the State of Washington, petitions this Court to issue a Writ of Certiorari to review the judgment of the Washington State Supreme Court entered in this proceeding in January, 1978. A petition for rehearing was denied and mandate issued by that court on June 9, 1978.

OPINIONS BELOW

Roger Rutcosky commenced this action in state court in August of 1974, suing Big Bend Community College (hereinafter referred to as BBCC), its

Board of Trustees, and President. Rutcosky requested, and the trial court ordered, that he was entitled to a contingent fee for a BBCC high school education proposal that had been accepted by the United States Army. Under that proposal, BBCC provided educational services for United States Eighth Army personnel in Germany pursuant to the Pre-Release Education Program (PREP) (38 USC §§ 1695-1698).

Notwithstanding 10 USC § 2306(b), which provides re contracts with the Army that:

> Each contract * * * shall contain a warranty, * * * that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage brokerage or contingent fee, * * *

the state court has awarded, from the contract proceeds of a contract with the United States Army, a contingent fee to Rutcosky of five percent of all revenues generated for the first five years and two and one half percent of all PREP revenues generated in the following five years. The state court imposed this percentage contingent fee upon the entire gross PREP revenues of $10,442,872 earned as of December 21, 1975.

Subsequently, in March, 1977, the trial court extended the judgment and its contingent fee assessment to a non-PREP educational agreement entirely funded by appropriations to the United States Army.

Both the original and extended judgments were appealed to the Washington State Supreme Court. After consolidation of both appeals, the court ruled in January of 1978 that Rutcosky had made an enforceable contingent fee agreement with the college's president in regard to the college's PREP proposal and program. Referencing 10 USC § 2303, it ruled 10 USC § 2306(b) inapplicable because the college was not paid from United States monies appropriated to the Army, but by assignment of individual soldiers' United States Veterans Administration benefits directly to the college. No mention whatsoever was made in regard to whether 10 USC § 2306(b) applied to the non-PREP contract paid for out of Army funds.

On June 9, 1978, the State Supreme Court denied the college's Petition for Rehearing on an eight-to-one vote and entered an order of mandate the same day (Appendix A).

JURISDICTION

This Writ of Certiorari is sought under the authority of 28 USC § 1257(3) and United States Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

Does the prohibition against contingent fee arrangements contained in 10 USC § 2306(b) apply to an agreement to provide educational services to the United States Army, pursuant to the Pre-Release Discharge Program authorized in 38 USC §§ 1695-

1698, through which tuition and fees are funded by Veterans Administration benefits assigned to a college by matriculated military personnel?

STATUTES INVOLVED

Public Law 91-219, the Veterans Education and Training Act of 1970 (38 USC §§ 1695-1698), created the Pre-Release Education Program (PREP). It offers active duty military personnel courses for a secondary school diploma and post secondary education. 38 USC § 1698(a) provides that through the Secretary of Defense, the military branches shall provide training facilities and released time necessary to carry out the PREP program. The Veterans Administration is required to pay PREP participants an educational assistance allowance equal to the school's established charge for tuition, fees, books and supplies or the lesser sum of $175.00 before 1972 amendments or $292.00 per month after the 1972 amendments.

10 USC § 2303 and its companion sections of the Military Procurement Act apply to all military service contracts for which "payment is to be made from appropriated funds." Section 2306 of that Act prohibits certain types of procurement practices, such as cost-plus, and a percentage of costs agreement. It also requires disclosure of cost-plus fixed subcontracts, limits research and development cost to 15% of the contract, limits architectural fees, etc. 10 USC § 2306(b) requires a warranty that the contractor had not employed on a contingent fee basis

an independent contractor to solicit or obtain the military procurement contract. Contracts breaching this statutory contingent fee warranty may be annulled.

STATEMENT OF FACTS

In July of 1971 the Department of the Army sent a letter soliciting BBCC to prepare a proposal to provide high school and remedial education to Eighth Army personnel located in Germany. This was to be accomplished pursuant to the PREP program outlined in 38 USC §§ 1695-1698. BBCC was advised that on-duty classes were to be provided for all military personnel who enrolled.

In that same month, Rutcosky met with the college's President for the purpose of seeking ideas on grant proposals that might be developed. The college President agreed that the college would take care of Rutcosky if he prepared a response which the Army would accept.

Rutcosky then prepared the college's PREP proposal. He then commenced personal negotiations with the Army educational specialist who had been assigned the task of setting up the military's early PREP programs. On November 8, 1971, the United States government entered a contract with BBCC for provision of PREP program services to the United States Army (Appendix B).

The agreement between the United States and BBCC provided that educational services were to be provided to military personnel qualifying under the

PREP statutes. Payment for tuition of fees was to be made either by enrolled students or the Veterans Administration. The Army was to supply logistical support, including classroom facilities, clerical assistance, postal service, and commissary privileges.

The college commenced performance of its PREP contract in February, 1972. Rutcosky was sent to Germany as one of the area coordinators. Shortly thereafter Rutcosky notified the college of his copyright claim to the PREP proposal. He then advised the college President that he wanted payment from PREP revenues on a contingent fee basis.

Rutcosky filed a federal copyright infringement suit against BBCC which was dismissed in June, 1976.

The State Supreme Court disposed of 10 USC § 2306(b) with the following short paragraph:

> * * * the college contends that Plaintiff's agreement is illegal as violative of 10 USC § 2306(b). Its argument fails. 10 USC 2306 references § 2304(sic). That statute applies to procurement by the Armed Services. Here the contract specifically excluded any financal liability upon the Army. Rather, all compensation came from individual soldiers assigning certain Veterans Adiminstration benefits directly to the college. The statute is not applicable to this agreement.

Within a week after receiving the State Supreme Court's conclusion that 10 USC § 2306(b) was inapplicable because the monies involved were private funds, the college received the attached copy

of a General Accounting Office communication to the administrator of the Veterans Administration. (Appendix E) The GAO communication incorporated an opinion by the V.A.'s General Counsel that implicitly reaches an opposite conclusion regarding the nature of the monies expended for PREP tuition and fees. V.A.'s General Counsel responded to the GAO query as to whether excess PREP tuition and fee revenues can be recaptured by the V.A.:

> It is our view that the law all along has provided for reimbursement of costs.

These matters were noted in the college's Motion for Reconsideration which was denied by the State Supreme Court on June 9, 1978.

BBCC now finds itself on the horns of a federal-state dilemma. The Washington State Supreme Court considers PREP tuition and fees to be "private monies" subject to a 10-year contingent fee. Alternatively, the state court considered that these are not appropriated funds subject to 10 USC § 2303, and hence not included within 10 USC § 2306(b), since they were not directly appropriated to the United States Army. These specific federal appropriations are noted in footnote ....., page ..... of this petition. The United States General Accounting Office and Veterans Administration, as reflected in Appendix E, regard these PREP tuition and fees to be monies subject to reimbursement to the federal agency from whence they came: the Veterans Administration.

REASONS FOR GRANTING THE WRIT

A. There is a Substantial Federal Question.

1. THE ISSUE IS OF NATIONWIDE IMPORTANCE.

The V.A. General Counsel's Opinion (Appendix E) refers to approximately 200 schools which have offered PREP programs. The nine PREP contractors audited by the GAO received nearly $48,000,000. Although the PREP program has ceased for an interim period, it is scheduled to resume in 1979. The Washington State Supreme Court now offers the only precedent regarding the application of 10 USC § 2306(b) to the PREP law. The state court's ruling that tuition and fees payments expended in PREP were private monies not subject to 10 USC § 2303 could become a national precedent freeing PREP contracts from the federal restraints which are applicable to military procurement contracts. This case offers the only recent interpretation of the federal policy regarding contingent fee arrangements affecting military procurement contracts. The Washington State Supreme Court interpreted 10 USC § 2306(b) to be a mere technical statute and interpreted it in a vacuum free of public policy considerations.

2. THE FEDERAL PROHIBITION OF CONTINGENT FEE ARRANGEMENTS.

Reduced to its simplest terms, this case raises the issue of whether a contingent fee arrangement, such as the one at issue, should be set aside in deference to the federal law, 10 USC § 2306(b), and the long-standing public policy.

The concept of prohibiting contingent fee contracts between a military contractor, and one who procures a specific military contract for such contractor, is not new. In 1865 this Court declared in *Providence Tool v. Norris*, 2 Wall (69 U.S.) 45 that express contingent fee agreements to procure military contracts are so fraught with the potential for corruption that they must be deemed void because:

> * * * consideration as to the most efficient and economical mode of meeting the public wants should alone control * * * . Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, and express contingent fee contracts to procure a specific rifle contract (* * * have this tendency, is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of public funds.

The Court continues at page 54 at 2 Wall:

> * * * (such contracts) * * * are void as against public policy without reference to the question of whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements.

The covenant against contingent fees contained in 10 USC § 2306(b) was born of this rationale. At § 42.20 of *Government Contracts*, McBride and Wachtel restates the history of this common law and statutory prohibition. They note that a convenant similar to that of 10 USC § 2306(b) has been util-

ized in United States Military contracts since 1918. In 1919 the clause was amended to provide an exception in the case of bona fide commercial representatives.

The original insertion of a clause prohibiting contingent fee arrangements in government military contracts was a matter of executive policy and continued as such until 1941. In that year Congress passed the first War Powers Act (Act of December 18, 1941 (55 Stat. 839)). Executive Order 9001 (December 27, 1941) issued pursuant to that Act, required the inclusion of a warranty against contingent fees.

The present wording of the covenant against contingent fees emanates from the Armed Services Procurement Act of 1948. 62 Stats. 23, §4(a). References to the legislative history regarding the rationale for the convenant demonstrates why it is such a fundamental part of military procurement policy.

Thus in the Senate Armed Services Committee's Report number 571, 80th Congress, Calendar number 597, July 16, 1947, the Senate Committee reported that one of the major purposes of the bill was to lift the peace time limitations upon Armed Services procurement that had generally permitted only advertising-bid methods of military procurement. The Committee notes at page 1 of its report that the Armed Services Procurement Bill:

> During the House hearings on this Bill, which were exhaustive in character, a thorough study of the various exceptions to the requirements for advertising was made. * * *
> This Bill, as amended, (to include the covenant against contingent fees) makes uniform all the laws and rules governing purchase procedures for the Armed Services and repeals many obsolete and diverse laws.

Further explaining the amendment prohibiting contingent fee arrangements as well as other restrictions upon negotiated contracts, the Senate adopted a quote from the House Armed Services Committee Report that stated:

> The Bill * * * holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses * * *

In short, both the Senate and the House agreed that if an exception to the former limitations upon military procurement was to be made, it could only be accomplished within the framework of certain limitations.

The 1947 Senate Committee Report, at p. 18, indicated that when it added the present statutory requirement (10 USC § 2306(b)) that military contracts contain the covenant against contingent fees, it was

> In order to guard against the possibility of a supplier retaining the services of a broker or agent to secure contracts from the agencies upon a contingent fee or similar basis.

Rutcosky's agreement to procure the Army's

PREP contract falls squarely within the scope of contingent fee arrangement that Congress reprehends. The Rutcosky agreement:

1. Was a contingent fee agreement entirely contingent upon RUTCOSKY obtaining a specific Army contract.

2. Impacted an Army procurement contract executed after RUTCOSKY participated in negotiations with military procurement personnel.

3. Portended a contingent fee reward so sizeable that the potential for corruption of the negotiation process was substantial. As will be subsequently noted, we are not contending that there has, in fact, been corruption.

B. **Conflicts Among Circuits Must be Resolved.**

Since promulgation of Executive Order 9001 (December 27, 1941), federal and state courts have charted divergent courses on the contingent fee issue. As McBride and Wachtel note in § 42.20 of *Government Contracts*, the federal circuit courts and state supreme courts have taken both liberal and conservative positions on the issue of whether the existence of a contingent fee arrangement, per se, voids such an agreement. The conservative and more prevalent position is expressed in *Mitchell v. Flintkote*, 185 F. 2d 1008 (2d Cir.-1951). Flintkote had retained Mitchell on a contingent fee basis to promote its reputation as a camouflage paint contractor among World War II government officials. Subsequently, Flintkote was placed on the government's list of con-

tractors to whom bid invitations were sent. After Flintkote won a bid contract, Mitchell sued for his contingent fee. Flintkote pled that Executive Order 9001 voided the contract between Mitchell and Flintkote, and the Second Circuit concurred. The Second Circuit refused to apply the rationale of some cases in which such arrangements were voided only if there was proof that something sinister had actually occurred. The court concluded,

> * * * as Mr. Justice Holmes pointed out in *Hazelton v. Sheckells*, 202 U.S. 71, 79, 26 S. Ct. 567, 50 L.Ed. 939, it is the tendency to corruption, not what was done in the particular case that justifies the rule * * *
> Executive 9001 is vigorous in its requirements. The order flatly requires that no person be employed on a contingent fee to solicit or secure the contract. No exception is made for cases in which nothing sinister was contemplated or done under the terms of the contingent fee contract * * *

Similarly in *LeJohn Manufacturing Company v. Webb*, 22 F. 2d 48, 51 (D.C. Circuit 1955), the District of Columbia Court of Appeals voided a contingent fee agreement on the grounds that Executive Order 9001 had been breached. Webb had made an oral agreement entitling him to five percent of all revenues generated from electric fans sold to the military. The District Court enforced the contingent fee contract upon the rationale that there had been no proof of any political or sinister influence. The Circuit Court reversed, stating:

Actual evidence of improper conduct is not nec-

> essary to render such agreement unenforceable. The law looks to the general tendency of such agreement; and it closes the door to temptation, by refusing them recognition in any of the Courts of the Country. *Providence Tool Company v. Norris*, 1864, 2 Wall 45 69 U.S. 45, 56.

Other cases following the "per se" approach include *Bradley v. American Radiator*, 159 F.2d 39 (2d Circuit-1947) and *United States v. Paddock*, 178, F.2d 394 (5th Circuit-1950), rehearing denied in 180 F.2d 121, Cert denied 1950, 340 U.S. 813.

Opposed to the Second, Fifth and District of Columbia Circuits "per se" approach is the "sinister intent" test outlined by the Third Circuit in *Browne v. R & R Engineering*, 264 F.2d 219 (1958). Like Mitchell of *Mitchell v. Flintkote*, Browne made an agreement to have a military contractor (R & R Engineering) placed upon a list of those invited to bid on certain defense contracts. Like RUTCOSKY, Browne's services went further and included helping the preparation of drawings, estimates and technical data required and/or considered useful in bidding. It was understood that payment for all services, except certain drawings, would be contingent upon success in getting Atomic Energy Commission contracts. The trial Court voided the contract after Executive Order 9001 was proffered as an affirmative defense.

The Third Circuit reversed. Noting that it was impressed by the fact that the trial Court made no finding that Browne had exerted any undue influence or did anything morally wrong, the Court regenerated the pre-executive order rationale of *Steele*

v. Drummond, 275 U.S. 199, 205 (1927), and stated that detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. Accordingly, the Third Circuit concluded, since the parties had not fixed a sum certain for either the contingent fee portion of the agreement or the services portion of the agreement, it would allow Browne to recover on a quantum meruit basis for the services he had performed.

McBride and Wachtel chart these divergent courses in §42.20 of *Government Contracts* and conclude that the Courts are hopelessly divided. The anathama such confusion deals to the, common law created and legislatively ratified, public policy implicit in the 10 USC § 2306(b) prohibition requires a United States Supreme Court resolution of the issue.

C. The State Court Misconstrued 10 USC § 2306(b).

10 USC § 2303 provides that the Military Procurement Act applies to:

> "(a) * * * to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in Subsection (b), and all services, for which payment is to be made from appropriated funds:
> (1) The Department of the Army.
> (2) The Department of the Navy.
> (3) The Department of the Air Force.
> (4) The Coast Guard.
> (5) The National Aeronautics and Space Administration."[1]

[1]See 10 USC 2303 (b) & (c) Appendix F, for remainder of statute.

The State Supreme Court's ruling that (10 USC 2306(b)) is inapplicable because PREP tuition and fees had not been paid from funds appropriated to the United States Army as flies in the face of the public policy upon which the statute is based. In explaining the purpose of 10 USC § 2303, the Senate Armed Services Committee explained at page 5 of Senate Report Number 571, 80th Congress, First Session, the two major factual predicates that precipitate 10 USC § 2303 jurisdiction:

> This section makes the coverage complete for [1] supplies or services to be paid for from appropriated funds and establishes the principle of one agency purchasing, or [2] making contracts for, the use of other agencies. [Numbering ours]

In other words, the military procurement law applies to services purchased from appropriate funds and makes 10 USC §2306(b) applicable whether the agency is purchasing for its own use or for another agency.

The instant case meets these jurisdictional requirements. Under the subject contract, PREP tuition and fees were paid by assignment of V.A. benefits paid from Congressional appropriations.[2]

[2]The following citations reference congressional appropriations made for support of the PREP program which is Chapter 33 of 38 U.S. Code:
1971: $1,888,700,000 for 38 USC, Chapter 21, 31, and 33-39; P.L. 92-78, 85 Stat. 297; 8/10/71.
1972: $2,224,400,000 for 38 USC, Chapter 21, 31, and 33-39; P.L. 92-383, 86 Stat. 547; 8/14/72.
1973: $2,526,000,000; P.L. 93-137, 87 Stat. 497; 10/26/73.
1974: $750,000,000; P.L. 93-261, 88 Stat. 76; 4/11/74.
1975: $811,700,000; P.L. 93-624; 88 Stat. 2016; 1/3/75.

That BBCC's PREP contract was made for the benefit of the United States Army is also evident from a reading of the same. (Appendix D) Although it can be argued that the contract was made for the benefit of military personnel, the semantics involved in distinguishing between an Army contract that secures benefits for military personnel and an Army contract that assists Army personnel is almost impossible. BBCC's PREP program did provide consideration to the United States Army, since the contract provides for teaching of remedial skills, high school education and associate of arts degrees.

As earlier noted, the Veterans Administration and the General Accounting Office have taken the position that all monies paid to BBCC pursuant to the PREP contract may be reclaimed by the V.A. acting on its own account. That position accords with the above analysis. Moreover, the BBCC-Army PREP contract obligation of the Army to increase its logistical support to BBCC in case of reduced tuition and fees manifests the governmental interest in this contract.

Nor can the argument be made that the statutorily required covenant against contingent fee agreements is waived by failure of the Army to insert the required boiler plate language. That the negligence of a federal employee cannot waive a public policy of the United States or federal law is a principle well established. See, *Mitchell v. Flintkote*, 185 F. 2d 1008 (2d Cir. 1953) re contingent fees.

In short, this case must be viewed as one requiring application of the public policy implicit in the statute. This court utilized the public policy of the Anti-Kickback Act, 41 USC § 51, to fill in the interstices of that statute in *United States v. Acme Process Equipment Company*, 385 U.S. 138 (1966), and should also do so in the instant case.

In *Acme*, the United States sought to void a contract with a gun manufacturer that had entered into kickback arrangements with subcontractors. The contractor was acquitted of the criminal offense because the law did not apply to fixed fee contracts.

When the United States refused to pay the contract, Acme secured a Court of Claims judgment in its favor. This Court noted that if Congress limited the act to fixed fee contracts, it was only because other types of negotiated contracts were rarely utilized in 1946. Congress was seeking to prohibit a generic evil—not to effect a technical, wooden prohibition limited to certain types of contracts. This Court then filled the hole in the statute by concluding that the public policy embodied in the Anti-Kickback Law required that the United States be able to void the contract. In so concluding, the following statement was made:

> * * * As this Court said about the conflict-of-interest statute in *United States v. Mississippi Valley Company, supra*, 364 U.S. at 565 5 L. Ed. 2d at 297, it is appropriate to say that it is the 'inherent difficulty in detecting corruption which requires that contracts made in violation of * * * the Anti-Kickback Act be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent.'

CONCLUSION

The Washington State Supreme Court has emasculated the federal statute and has judicially compromised the public policy of opposing contingent fee agreements on federal contracts. We respectfully submit that 10 USC § 2306(b) renders invalid the contingency fee for Mr. Rutcosky. We further submit that the rationale expressed by this Court in *Acme*, *supra*, also supports our request for reversal of the state court decision.

Dated this 5th Day of September, 1978.

Respectfully submitted,

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(No. 44716. En Banc. February 2, 1978.)

ROGER R. RUTCOSKY, ET AL, RESPONDENTS, v. HAROLD L. TRACY, ET AL, APPELLANTS.

BRACHTENBACH J. -- Plaintiffs were awarded substantial damages against Big Bend Community

College (college). A review of the facts is a necessary predicate to an adequate discussion of the legal issues. In summary, plaintiff Roger R. Rutcosky developed a program proposal which in about 4 years generated $10 million in federal funds for the defendant college. The college would deny plaintiff any compensation for his efforts; the court, finding an express contract, upon conflicting evidence as to the basis upon which plaintiff developed his proposal, awarded plaintiff a percentage of the funds received by the college. We affirm the judgment except for the award of prejudgment interest which we reverse.

Plaintiff was an instructor at the college for the 1970-71 year as a replacement for an instructor on sabbatical, therefore he did not expect a contract for the next year. Rather, he enrolled for graduate work at Washington State University to secure his doctorate. In July 1971, at a time when plaintiff was not a college employee, he asked the college president about the possible availabilities of research funds to develop a program to attract more local students to the college. The college president told plaintiff that no funds were available for such purposes, but showed plaintiff a letter from the United States Army soliciting proposals for development and operation of a predischarge educational program to assist servicemen to earn a high school diploma. (The program is referred to as PREP.) The proposal was for an Army division in Germany with potential enrollment of thousands of soldiers.

At the time of the meeting between plaintiff and the college president, no college employee was preparing a response to the PREP solicitation; in fact, the college probably would not have responded except for plaintiff's work. At this initial meeting no commitment was made by either party.

Plaintiff studied this proposal, did some preliminary research and then discussed the matter with the college president. There is conflict as to this key and controlling conversation. Only the plaintiff and the college president were present at the meeting. Both plaintiff and the president testified that plaintiff asked for, and the president promised, that plaintiff would be the dean of the PREP program. That promise was fulfilled. The critical point in which plaintiff and the president disagree is additional compensation claimed by plaintiff. Plaintiff testified that he asked for 30 percent of the revenue from the program and that the president said that if the program were adopted the plaintiff would be taken care of. The president

does not recall this conversation or alternatively denies any agreement regarding compensation.

Plaintiff, after additional research on his own time, prepared an 87-page proposal to develop and administer the PREP program. In September 1971, the college submitted plaintiff's unrevised proposal to the Army. On October 22, 1971, plaintiff filed a federal copyright on his proposal document. On October 28, the Army selected the college to implement a PREP program as outlined in plaintiff's proposal.

Within a few weeks, plaintiff assembled a staff, went to Germany and started the program. For reasons which are not involved in this suit, plaintiff later was lawfully discharged.

The PREP program has been successful. The college has been selected to provide PREP programs to several other branches of the armed services. In 4 years the college has received approximately $10 million from the program. The college has operated the program at a profit so that it has had PREP-generated funds available for other college spending.

The trial court awarded plaintiff 5 percent of the PREP revenues for the first 5 years of the program and 2 1/2 percent for the next 5 years.

(1) The college attacks a number of the

findings and conclusions. We need not extend this opinion with a discussion of the specifics. Two points suffice. First, based upon conflicting evidence, the court accepted the plaintiff's version of the existence of a contract. There is substantial evidence to support plaintiff's contention; therefore the trial court's finding is binding upon us. Second, was the failure of the parties to agree upon the exact amount of compensation fatal to plaintiff's recovery? Even by plaintiff's testimony the college president did not objectively manifest agreement with or accession to plaintiff's request for 30 percent of the revenues. The trial court found that there was an agreement and understanding between plaintiff and the college that plaintiff would receive a percentage of the generated revenues if his proposal was accepted by the Army. There is substantial evidence to support that finding.

(2) The general rule is that failure to agree upon the precise amount of compensation does not defeat the existence of a contract. In other words, once the fact of compensation is established, failure to agree upon the precise degree of compensation does not vitiate the performing party's right to reasonable compensation. Jones v. Brisbin, 41 Wn.2d 167, 247 P.2d 891 (1952); 1 S. Williston, A

Treatise on Law of Contracts § 41, at 129 (3d ed. 1957). Consequently, a contract was formed although the exact amount of compensation was unspecified.

Having disposed of the college's contention that plaintiff is entitled to nothing, the question is the proper amount of compensation.

Once the agreement as to the fact of compensation was established, the trial court was entitled to invoke its equitable powers in determining a reasonable amount of compensation. It did so in 28 pages of carefully drawn findings of fact and conclusions of law.

The court had before it the fact that the program had expanded from one Army division into multiple Army installations, Air Force units, even to Navy ship programs. Yet the court recognized the diminishing influence of plaintiff since he had been lawfully discharged. Therefore, the court fashioned an equitable remedy of 5 percent of gross revenues for 5 years and 2 1/2 percent for an additional 5 years. Plaintiff's testimony was that he originally asked for 30 percent of the gross.

We will not substitute our judgment for that of the trial court, absent abuse of discretion. We find no such abuse, but rather a careful, thoughtful evaluation of the evidence and theories by a

competent trial judge. We affirm the award.

Next the college claims that the contract, if found to exist, is ultra vires. We do not reach the merits of this issue since it is an affirmative defense to be pleaded as required by CR 8(c). It was not so pleaded.

At best, ultra vires was raised for the first time on a motion for reconsideration. Even at that stage it was framed as a defense of illegality. The defense came too late; in any event, there was substantial evidence of knowledge and ratification by the Board of Trustees of the college.

(3) Third, does the oral contract violate the statute of frauds? No. Full performance by one party removed a contract from that statute. Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 434, 348 P.2d 423 (1960). Plaintiff prepared the successful proposal and served as dean of the program until lawfully discharged. He fully performed and the statute is not applicable.

Fourth, the college contends that plaintiff's agreement is illegal as violative of 10 U.S.C. § 2306(b).[1] Its argument fails. 10 U.S.C. § 2306 references § 2304. That statute applies to procurement by the armed services. Here the contract specifically excluded any financial liability upon

the Army. Rather, all compensation came from individual soldiers assigning certain Veterans Administration benefits directly to the college. The statute is not applicable to this agreement.

(4) Fifth, the college argues that plaintiff forfeited any common-law rights to his proposal by obtaining a statutory copyright. It cites many cases but they all involve competition between common-law literary rights and statutory copyright remedies. No authority is cited for the proposition that filing a statutory copyright claim extinguishes a prior contractual agreement relating to the copyrighted material. We suspect that no such authority exists. It is recognized that a remedy for a breach of contract exists apart from any statutory remedies under the copyright statute. Benelli v. Hopkins, 197 Misc. 877, 95 N.Y.S.2d 668 (1950).

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[1] "Each contract negotiated under section 2304 of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration." 10 U.S.C. § 2306(b).

Finally, the college contends that the court erred in ordering it to "freeze" sufficient PREP funds to pay the ultimate judgment. Relying upon Centralia College Educ. Ass'n v. Board of Trustees, 82 Wn.2d 128, 508 P.2d 1357 (1973), the college argues that it is a state agency which can appeal, under RCW 4.92.030 and .080, without posting a supersedeas bond. We hold that the order is not the equivalent of requiring a supersedeas bond within the meaning of the statute. This is a unique case and our conclusion is buttressed by the fact that the legislature has mandated that the costs of PREP programs shall be borne by non-state treasury sources. RCW 28B.50.094. The theory behind the no supersedeas bond requirement for appeal by state agencies is that the state treasury is an adequate guaranty to the prevailing party. Here the plaintiff is arguably limited to PREP funds, although that specific issue is not before us. Equitable considerations demand that defendant make those funds available to satisfy his judgment.

(5) The trial court did commit error in awarding prejudgment interest. There was no agreement on the amount of compensation; therefore, plaintiff's claim was unliquidated until the court established his amount of recovery. Prejudgment interest is

recoverable only when the claim is liquidated. Prier v. Refrigeration Eng'r Co., 74 Wn.2d 25, 442 P.2d 621 (1968).

We find appellants' other assignments of error to be without merit.

Plaintiff cross-appeals urging error in the reduction of royalties from 5 percent to 2 1/2 percent for the second 5 years of the award. No authority is cited but, in any event, no error is present. The court fashioned an equitable remedy within its reasoned judgment and discretion. We will not substitute our opinion.

Judgment is affirmed, except as to the award of prejudgment interest, which is reversed.

WRIGHT, C.J., and ROSELLINI, HAMILTON, STAFFORD, UTTER, HOROWITZ, DOLLIVER, and HICKS, JJ., concur.

APPENDIX B

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

ROGER R. RUTCOSKY, et ux., Plaintiffs,	)	NO. 219304
vs.	)	J U D G M E N T
DR. HAROLD L. TRACY, et ux., et al., Defendants.	)	

THIS MATTER having come on for hearing this day before the above-entitled Court, notice having been given to all parties, the Court having assigned Findings of Fact and Conclusions of Law in this matter, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment against the Defendant, BIG BEND COMMUNITY COLLEGE, as follows:

1. From all revenue whatsoever derived from the PREP Program from its inception, and/or the State Treasury, an overriding royalty as damages in a sum of five percent (5%) of said gross revenue for a period of five (5) years from the date of inception of each such program on a separate company-by-company basis (or other similar-size military unit) for the G.I.s who were or are enrolled in PREP.

2. From all revenues whatsoever derived from the PREP Program, and/or the State Treasury, at the rate of two and one-half percent (2-1/2%) for an

additional five (5) years thereafter.

3. Payment of the Judgment hereunder shall be measured from the date first revenues or monies were or are received by BIG BEND COMMUNITY COLLEGE for G.I.s enrolled in and taking PREP courses and instruction on a company-by-company basis (or other similar-size military unit).

4. Said Judgment shall run against BIG BEND COMMUNITY COLLEGE, and its successor, assigns, transferrees, etc., as well as against any person(s) or entity(ies) who use or implement, directly or indirectly, in any form or manner whatsoever, the intellectual property and work product of ROGER R. RUTCOSKY, as contained in the PREP Proposal, to educate military personnel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that BIG BEND COMMUNITY COLLEGE shall have ninety (90) days from the date of this Judgment to pay damages accumulated and owing to the Plaintiffs herein, with interest thereon, at six percent (6%) per annum; and that further, BIG BEND COMMUNITY COLLEGE shall have sixty (60) days after the rendering of each fiscal year report to pay to ROGER R. RUTCOSKY, any monies owing to him as indicated pursuant to this Judgment. Any such monies as damages not paid within said sixty (60) days will bear

interest at the rate of eight percent (8%) per annum.

That this Judgment will bear the rate of eight percent (8%) per annum on all unpaid monies as damages until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs shall be awarded their costs in the sum of Eighty-Five and 15/100 Dollars ($85.15), in this matter.

DONE IN OPEN COURT this 3rd day of January, 1976.

Harold L. Clarke

JUDGE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROGER R. RUTCOSKY, et ux., Plaintiffs, vs. DR. HAROLD L. TRACY, et ux., et al., Defendants.	COURT'S MEMORANDUM OPINION No. 219304

Gentlemen: The Court has spent a great deal of time in considering the disposition of this case. I can assure both counsel that I have read several times all of the memoranda submitted by both parties, have reviewed the testimony presented and also I have looked at the exhibits that were admitted. At this

juncture, I would like to say that both counsel have done an excellent job in presentment of the case, both in the manner in which the trial was conducted, the handling of the witnesses, and most particularly, in the assistance given to the Court in the very comprehensive and pertinent memorandums submitted. In order to avoid excess length of this opinion, I will hereafter refer to Big Bend Community College as BBCC and Roger R. Rutcosky as RRR and the Predischarge Education Program as PREP.

The plaintiff, RRR, is a man with an interesting background. He became involved in the educational field after many years of diverse labors resuming his education in 1966 after he hurt his back while working as a truck driver. He obviously did well in school, graduating with honors and in a shorter than normal period of time. He came to BBCC at the request of a Mr. Ledeboer for one year period to replace an English instructor who was on sabbatical leave for a year. He commenced work in September, 1970, and the original contract period ended June 12, 1971. It appears that RRR met Doctor Wallenstien, the President of BBCC, during this period once or twice, but there was never any conversation up until after the end of the original contract period about PREP. It further appears that RRR taught during the summer

session of 1971 from June 14 to July 23 at BBCC. This summer employment had nothing to do with the PREP program. RRR enrolled at W.S.U. in June of 1971 in order to get his Master's Degree in Literature. It further appears that his plans were to visit his parents in Wisconsin after he finished teaching the summer session.

The first direct movement towards the PREP program occurred on or about July 26, 1971, at which time RRR went to Doctor Wallenstien's office to see if there was any chance to get state funds for an innovative teaching idea that he had. This was not a prearranged meeting, and was merely an idea that he had been contemplating. At this particular time, Doctor Wallenstien was in receipt of an Army solicitation letter asking for submission of PREP proposals. This letter was sent to various other institutions of higher learning throughout the country. Doctor Wallenstien showed the solicitation letter to RRR, and there was discussion about the application of RRR's ideas to the letter. RRR did certain work after this initial conversation in order to research the particular law that was applicable to this program and later the same day returned to see Doctor Wallenstien, at which time a further discussion was entered into. Apparently, dollar amounts were

discussed at this time, and it was contemplated that if the program were successful, large amounts of money would be available to BBCC. The exact contents of this conversation are somewhat in dispute. RRR recalls the conversation to be directed toward his wants and desires, at which time he informed Doctor Wallenstien that he wanted a deanship in the program and a percentage of the profits if the program were successful. RRR recalls Doctor Wallenstien saying something to the effect, "Don't worry. We will take care of it or I will take care of you." Doctor Wallenstien's recollection of that conversation is somewhat different. Doctor Wallenstien apparently recalls discussion regarding a position in the program if accepted but does not recall any conversation about a percentage of the profits.

RRR undertook work on the proposal at this time. This work basically was done in Wisconsin at his parents' home. The work commenced about August 5, 1971, and RRR returned to Washington on or about August 23, 1971, in order to get the history of BBCC, to ascertain the requirements for a high school education, which was one of the prime objectives of the PREP program, that is, the ability to furnish a high school diploma to the soldier/student and to put the proposal in final form. It appears that the

final proposal was delivered to Doctor Wallenstien about the first of September, 1971. RRR went to work at BBCC as a counselor in the Special Services Program about September 8, 1971, but this position had nothering (sic) directly to do with PREP. The proposal was then put into final form and forwarded to the appropriate military authorities over the signature of RRR. RRR recalls having some conversations at this time with Doctor Wallenstien in which he indicates he was relying on the agreement with him.

It appears that the school and the parties learned that the proposal had been accepted by the Army about October 28, 1971. RRR recalls a conversation with Doctor Wallenstien about the same date in which the doctor indicated that "we" will be rich and famous. Doctor Wallenstien also indicated that he was to pick the staff that was to go to Europe. RRR indicates once again he told Doctor Wallenstien that he wanted the deanship and a percentage of the money, at which time the doctor indicated, "Don't worry. There will be plenty of money for everybody." Doctor Wallenstien, in his testimony, does not recall this conversation. RRR was given a contract with the college for Director of Instruction and left for Europe on December 2, 1971. RRR recalls a meeting in February of 1972 in Germany, at which time RRR again

indicated he wanted a percentage of the profits and that he would take 5% off the top. Doctor Wallenstien does not recall the conversation in February of 1972 and indicated he would have to take it up with his attorneys when he got back to the States. Apparently this was done, and at this time, Exhibit No. 42, the letter to RRR, March 9, 1972, was sent. RRR sent several messages to interested people regarding his concern over his direct participation in the financial aspect of the program, and this led to his eventual discharge on June 22, 1972. In connection with the PREP proposal, it should be noted that RRR had mentioned copyright in connection with the proposal several times during the fall of 1971 and did, in fact, apply for and receive a copyright on October 22, 1971.

The position of the defendants indicate, among other things, that some of the ideas set forth by RRR in his proposal were not really new or unique ideas and that some of the teaching methods and proposals of RRR had been used at BBCC previously and in one of the high schools that was contacted by RRR. Also, the Court received testimony from Vern Hagen and Mr. Glaese; both of these parties were directly involved in the program in Germany. The testimony from these witnesses would indicate that the PREP proposal as

authored by RRR was not used in many specific area (sic); for example, implementation of the LAPS and LRC phases of the program were not implemented or were at least not implemented to the degree indicated in the original proposal. It appears that most of the teaching that was done, at least during the time periods when the witnesses were present, was undertaken in the more traditional, formalized classroom settings.

There is no question and it appears to be conceded by all parties that the program has been highly successful. The program initially was undertaken through the Eighth Army in Europe but has been expanded and is now being used by the Air Force and the Navy. It appears to the Court that involvement of these branches of the service was through the use of the proposal authored by RRR. The large sums of monies generated by the program are reflected in the documents prepared by Mr. Fall of the State Auditor's office.

The plaintiff advances several theories in support of his argument that he should receive compensation from BBCC in some form for the PREP proposal. Plaintiff indicates that the Court would be justified in entering judgment for the plaintiff under any one of the theories advanced, namely,

express contract, implied-in-fact contract, implied-in-law contract or promissory estoppel. The defendant points out to the Court that in the law of contracts, the courts cannot make new contracts for the parties and that the Court should not imply in law terms of a contract because of an alleged unjust enrichment on the part of a party when the terms of the contract are definite in themselves. In addition, the defendants contend that the affirmative defenses of Statute of Frauds, laches, res judicata and estoppel should apply to this particular case. Rather than review all of these contentions, theories and affirmative defenses in detail in this memorandum, suffice it to say that I have reviewed all of them very carefully in arriving at my decision in this particular case.

Both sides and rightfully so have made use of the "but for" theory. In other words, BBCC would never have entered into the program with the various services but for the proposal authored by RRR. Conversely, the defendants logically argue but for the facilities, the history and the ability of BBCC to meet the institutional requirements of the services, the contract would not have been awarded. Both of these arguments make good sense and are difficult to rebut either way. There appears to be little

question in the Court's mind that the proposal as authored was an original work product by RRR. Certainly some of the ideas and concepts used had been thought of, used and discussed before. There is very little in the whole domain of human knowledge that is truly unique or original. Perhaps the thought of Justice Story writing in the case of Emerson v. Davies, 8 Fed. Cas. 615 (1845), wherein he said, "In truth, in literature, in science and in art, there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout." The decision goes on in much greater length, but I will not quote it in full here, but I think these few words convey a thought that has been frequently referred to in cases of this type. It appears to the Court that without the original efforts of RRR, the contract, which has been of such beneficial interest to BBCC, would never have been awarded. It is the Court's opinion that RRR is entitled to compensation beyond that which he has received to this particular point in time.

The Court feels it could adopt more than one theory to support a judgment for the plaintiff. There obviously is a conflict in the testimony of the parties as to the original conversations between the parties, but if the Court were to adopt the conversa-

tions referred to by RRR, it is the Court's opinion that I could, in fact, find an express contract was entered into by the parties requiring a deanship and a percentage of the profits to be paid to RRR. I am, of course, cognizant of the fact that the defendants contend also that there was an express contract that called only for work in the program and no percentage or other method of compensation to RRR. Secondly, the Court feels that the facts would support an implied-in-fact contract. It is inconceivable to me, considering the possibility and the potential involved in this particular case, that RRR would enter into this agreement only on the basis of a promise of a position in the program. I feel that the facts would indicate that there is justification for finding that there was an implied-in-fact contract not only for a position but for a percentage of the profits.

However, the Court feels that the theory that best supports the plaintiff's position is an implied-in-law contract upon the fundamental principle that one should not be unjustly enriched, quantum meruit, at the expense of another. The efforts of RRR, his compilation of the ideas and concepts (original or not) was the catalyst that got this program off the ground. The tremendous benefit to BBCC, both

directly and indirectly, in comparison to the status of the school before the proposal is overwhelming. The question that remains before the Court at this time is how compensation should be arrived at.

The Court is very cognizant of the defendant's position that any compensation due RRR was provided for in an express agreement to employ RRR, and that obligation was lawfully terminated and the termination was confirmed in a subsequent Superior Court action in Spokane County. In addition, the Court is aware of the $2,000 stipend to be paid as evidenced by exhibits in the file. I have read those exhibits and am aware of the language contained in the exhibits. It is, however, the Court's interpretation of the testimony that all individuals that were going to Europe were to be paid the $2,000. It was Doctor Wallenstien's testimony that the group explained to him that they were going in a pioneering effort, and they felt that each individual was to receive $2,000. The Court was not given the benefit of any additional testimony from any of the other individuals involved in this project as to this specific item.

The program continues to operate to the benefit of BBCC. Indications are that the program will continue to so operate for many years in the future since all of the service branches involved seem to be

pleased with the operation. There is, of course, the possibility that Congress could cut off the funding for this particular program and then, of course, it would immediately cease. It is this Court's opinion, as indicated, that the product produced by RRR falls into the category of an idea that was manifested in the finished work product. It appears that the courts in this area generally protect what might best be called common law copyright. In this connection, some type of a royalty seems to be the most equitable method of compensation if there has been an infringement or appropriation of the work product or idea. In this regard, the Court is cognizant of the fact that protection under a copyright runs for a limited period of time. I am not implying that we are bound by copyright law in this particular case, however. It does appear to this Court that the value of the services rendered by Mr. Rutcosky would diminish a be diluted with the passage of time. It appears to me that this has already happened to some degree, and with Mr. Rutcosky not being actively involved in the program, it appears to me there is a distinct possibility that this may continue to happen in the future. It appears to the Court, based upon all of the circumstances and factors presented, that RRR is entitled to a royalty based upon the gross revenues

received from the PREP proposal by BBCC. It is the Court's opinion that this royalty should be 5% of the gross revenues for a period of five years from the date of the inception of the program and that RRR should continue to receive royalty at the rate of 2.5% for an additional five years. The only figures that have been furnished to the Court are those contained in the report of Mr. Fall, and these are the figures the Court has in mind in arriving at this decision. There has been some time lapse and BBCC should have 90 days from the date of a judgment to pay royalties accumulated to this date with interest thereon at 6% per annum. BBCC should have 60 days after the rendering of each annual report to pay to RRR any monies owing to him; any monies not paid within the 60-day period will bear interest at 8% per annum. It is the Court's opinion that this judgment should run against BBCC and not against the individuals involved. It is the Court's finding that all of the officers and employees of BBCC were acting in their representative capacity, that their acts were done in the furtherance of the business of BBCC and that the college is bound by the acts of the various individuals. Appropriate documents may be prepared and presented for the Court's signature.

DATED THIS 31st day of October, 1975.

Harold D. Clark

JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ROGER R. RUTCOSKY, et ux.,	)	
	)	
Plaintiffs,	)	No. 219304
	)	
vs.	)	FINDINGS OF FACT & CONCLUSIONS OF LAW
DR. HAROLD L. TRACY, et ux., et al.,	)	
	)	
	)	
Defendants.	)	

THIS MATTER, having come on for hearing before the above-entitled Court for trial, the Plaintiffs having indicated that they were ready for trial and being represented by their attorneys, MARK E. VOVOS and CARL MAXEY; the Defendants having indicated they were ready for trial, and being represented by the Attorney General, by and through JAMES KAISER; and the Court having heard the evidence and the testimony introduced by all parties, and considered the files and records in this matter, the appropriate Memorandums of Law and Motions and every other matter and thing pertinent to this cause as submitted by the parties, including the exhibits on file therein, now, therefore, the Court makes the following:

FINDINGS OF FACT

I

That this case was brought before this Court on

a Stipulated Change of Venue and the parties were properly before the Court.

II

That ROGER R. RUTCOSKY was a resident of Grant County Washington; and the Defendants, officers and trustees of BIG BEND COMMUNITY COLLEGE, also reside and act for and on behalf of BIG BEND COMMUNITY COLLEGE in Grant County, Washington.

III

That judicial notice is taken that the Pre-discharge Educational Program (PREP), authorized by Public Law 91-219, as amended, is a program designed to assist servicemen and servicewomen, who have been members of the U.S. military services over one hundred eighty (180) days, in obtaining high school diplomas and/or to overcome educational inadequacies, so that they may enter or successfully pursue a post-secondary program of education and training.

IV

That ROGER R. RUTCOSKY graduated from college with honors and came to BIG BEND COMMUNITY COLLEGE at the request of that school for a period of one (1) year to replace an English instructor who was on leave.

V

That ROGER R. RUTCOSKY was employed by BIG BEND

COMMUNITY COLLEGE and did work as an English instructor under an express written contract for the regular academic year commencing September of 1970 and ending June 12, 1971.

VI

That ROGER R. RUTCOSKY was employed by BIG BEND COMMUNITY COLLEGE and did work as an English instructor under an express written contract for the regular summer session commencing June 14, 1971 through July 23, 1971.

VII

That the summer employment from June 14 through July 23, 1971, had nothing whatsoever to do with the PREP Proposal, compiled and authored by ROGER R. RUTCOSKY, or program.

VIII

That in June of 1971, to further his education, ROGER R. RUTCOSKY enrolled at Washington State University toward the end of obtaining his Master Degree in English Literature. At this time, ROGER R. RUTCOSKY had plans to visit his parents in Wisconsin after he finished teaching the summer session which ran from June 14, to July 23, 1971.

IX

That on 21 July 1971, the Department of the Army sent out a letter (with enclosures) to

institutions of higher education throughout the United States, including a letter directed to and received on July 23, 1971, by ROBERT J. WALLENSTIEN, President, BIG BEND COMMUNITY COLLEGE, which competitively solicited proposals that would:

1. Conceptualize an imaginative, resourceful and flexible PRE-DISCHARGE EDUCATION PROGRAM (PREP) to provide instruction and study for G.I.s in the Eighth Division, Germany, to earn and receive a high school diploma; and
2. Document and provide the institutional capability to implement the PREP Proposal as an educational program.

X

That, on or about July 26, 1971, ROGER R. RUTCOSKY went to the office of DR. ROBERT WALLENSTIEN, the president of BIG BEND COMMUNITY COLLEGE, to see if there was a chance of obtaining State research funds re ideas he had for unique application of educational methods and concepts using audio-visual equipment and local teachers and para-professionals etc. -- many of the same ideas which later were articulated in his PREP Proposal.

XI

That this meeting between DR. WALLENSTIEN and ROGER R. RUTCOSKY on July 26, 1971, was not pre-arranged and ROGER R. RUTCOSKY knew nothing up to this time about the Army solicitation letter of July 21, 1971.

XII

That at this first meeting, DR. WALLENSTIEN told ROGER R. RUTCOSKY there were no $tate research funds available; however, DR. WALLENSTIEN did hand ROGER R. RUTCOSKY the letter from the Army to BIG BEND COMMUNITY COLLEGE, dated July 21, 1971, and after giving him an opportunity to read it, DR. WALLENSTIEN asked ROGER R. RUTCOSKY if he was interested in applying his ideas to the Army's request; that ROGER R. RUTCOSKY replied: "Yes!"

XIII

That BIG BEND COMMUNITY COLLEGE, including DR. WALLENSTIEN or other employees of the college, on July 26, 1971, had no plans and had not attempted to do any work whatsoever in response to the Army solicitation letter.

XIV

That after this conversation on July 26, 1971, ROGER R. RUTCOSKY did research on the applicable law (38 U.S.C. §1695-1697A), toward the end of

applying his ideas to the Army solicitation letter and then returned the next day, July 27, 1971, to see DR. WALLENSTIEN at which time, ROGER R. RUTCOSKY told DR. WALLENSTIEN that there were millions of dollars involved for whichever college submitted the best and most meritorious PREP Proposal and was selected to implement it as a program.

XV

That after the second meeting, on July 27, 1971, DR. WALLENSTIEN gave ROGER R. RUTCOSKY the "go ahead" to compile and author a PREP Proposal and Program which would satisfy the Army solicitation letter of July 21, 1971, so that BIG BEND COMMUNITY COLLEGE could secure the Educational Services Contract with the Army to implement the Pre-discharge Educational Proposal.

XVI

That further, at this second meeting, on July 27, 1971, in response to the "go ahead" given by DR. WALLENSTIEN ROGER R. RUTCOSKY specifically indicated that he would compile and author the PREP Proposal on his own time provided that if his PREP Proposal were approved by the Army and BIG BEND COMMUNITY COLLEGE was selected to implement it as a program, that ROGER R. RUTCOSKY expected:

1. A deanship of instruction as well as,

2. A percentage of the generated revenues if the program were successful.

DR. WALLENSTIEN recalled the meetings of July 26, 1971 and July 27, 1971 with ROGER R. RUTCOSKY, but he did not recall promising to give ROGER R. RUTCOSKY a percentage.

XVII

That in substance and effect, the intent and understanding of BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY was for BIG BEND COMMUNITY COLLEGE to pay ROGER R. RUTCOSKY for the use of his intellectual work product and property after implementation of the PREP Proposal as an Educational Program for individual student G.I.s.

XVIII

That BIG BEND COMMUNITY COLLEGE did not employ or retain ROGER R. RUTCOSKY and therefore did not agree to pay him a commission, percentage, or contingent fee, to solicit or secure a contract with the Army.

XIX

That after the conversations on July 26 and 27, 1971, ROGER R. RUTCOSKY was given the Army solicitation letter of July 21, 1971, by DR. WALLENSTIEN, and left the State of Washington to go to his parents' home in the State of Wisconsin where he

commenced work on the PREP Proposal on or about August 5, 1971, and basically completed his work endeavors on the project there prior to returning to BIG BEND COMMUNITY COLLEGE on or about August 23, 1971, and upon returning he received the assistance of BIG BEND COMMUNITY COLLEGE personnel in order to get the history of BIG BEND COMMUNITY COLLEGE and to ascertain the requirements for high school education in the State of Washington. At this time, ROGER R. RUTCOSKY put his PREP Proposal in final form.

XX

That during the dates July 24, 1971, through September 8, 1971, ROGER R. RUTCOSKY was not employed by BIG BEND COMMUNITY COLLEGE as an instructor or teacher nor did ROGER R. RUTCOSKY receive any compensation from BIG BEND COMMUNITY COLLEGE for any services during this period. ROGER R. RUTCOSKY was receiving unemployment compensation during this period of time, from July 24, 1971 through September 8, 1971.

XXI

The PREP Proposal was compiled and authored by ROGER R. RUTCOSKY. It contained, 1) a point by point response to the Army letter of July 21, 1971 to BIG BEND COMMUNITY COLLEGE, and 2) the history of BIG BEND COMMUNITY COLLEGE and its institutional capa-

bility and experience in conformity with the Army letter of July 21, 1971.

XXII

The PREP Proposal as compiled and authored by ROGER R. RUTCOSKY, content-wise, was the exclusive work product of ROGER R. RUTCOSKY and contained along with the history of BIG BEND COMMUNITY COLLEGE and its institutional capability and experience, ROGER R. RUTCOSKY'S ideas and methods and concepts of education adapted to satisfy the Army solicitation letter of July 21, 1971. Some of the ideas and concepts used in the PREP Proposal had been thought of, used, and discussed before, both at BIG BEND COMMUNITY COLLEGE and in one of the high schools that was contacted by ROGER R. RUTCOSKY. The PREP Proposal as authored by ROGER R. RUTCOSKY, contained, among other ideas and concepts and methods of education: individualized learning packets including classroom cassette programs, learning resource centers, alternative learning experiences by self study, staff and instructional flexibility, etc.

XXIII

That the PREP Proposal as compiled and authored by ROGER R. RUTCOSKY, content-wise is a plan of education which contains his unique application of a combination of educational ideas and theories and

concepts brought together in an innovative and concrete form that serves a number of diverse needs and objectives as set forth in the Army's solicitation letter of July 21, 1971.

XXIV

That the PREP Proposal compiled and authored by ROGER R. RUTCOSKY contained specific provisions for adaptation and change as circumstances required. The PREP Proposal as authored by ROGER R. RUTCOSKY was not used in many specific areas. Certain phases of the program were not implemented or not implemented in the degree indicated in the original proposal. Some of the teaching that was done after implementation of the proposal was undertaken in the more traditional formalized classroom settings.

XXV

That the draft of the PREP Proposal, as compiled and authored by ROGER R. RUTCOSKY, was delivered to DR. WALLENSTIEN on or about the first week of September, 1971.

XXVI

That on or about September 8, 1971, ROGER R. RUTCOSKY was once again employed by BIG BEND COMMUNITY COLLEGE and did work as a Counselor in their Special Services Program, which position had nothing whatsoever to do with the PREP Proposal solicited by

the Army.

XXVII

The final PREP Proposal as compiled and authored by ROGER R. RUTCOSKY was delivered to DR. WALLENSTIEN on or about the first week of September, 1971.

XXVIII

That on September 24, 1971, the typed 87-page proposal, "PRE-DISCHARGE EDUCATION PROPOSAL, submitted by Big Bend Community College, Moses Lake, Washington, Compiled and Authored by Roger R. Rutcosky," was transmitted to the Army as an enclosure of a cover letter on BIG BEND COMMUNITY COLLEGE official stationery, written and signed by ROGER R. RUTCOSKY.

XXIX

That the BIG BEND COMMUNITY COLLEGE Board of Trustees had notice and knowledge in the latter part of 1971 and early part of 1972 about the proprietary claims of ROGER R. RUTCOSKY with respect to his copyright and overriding royalty demands; and BIG BEND COMMUNITY COLLEGE, as well as its Board of Trustees, sought the advise (sic) and consulted extensively with the office of the Attorney General of the State of Washington.

XXX

That the official minutes of Board of Trustees, BIG BEND COMMUNITY COLLEGE, dated October 5, 1971, under REPORTS states: "Prep Proposal: Mr. Rutcosky has prepared a proposal to develop a program for high school completion and preparing G.I.s to enter college in Germany."

XXXI

That ROGER R. RUTCOSKY did apply for and receive a Federal Statutory Copyright on October 22, 1971. Thereafter ROGER R. RUTCOSKY notified DR. WALLENSTIEN and other persons interested in PREP both at BIG BEND COMMUNITY COLLEGE, the Washington State Board of Community College Education, and responsible personnel with the Army, of his actions in this regard. However, the effectiveness or validity of this Federal Copyright was not an issue before the Court in this suit and the Court refrains from making any finding in this regard.

XXXII

That by letter dated October 7, 1971, to ROGER R. RUTCOSKY, Paul T. Kunkle, SAFEGUARD Education Officer, requested further information from ROGER R. RUTCOSKY re the submitted PREP Proposal.

XXXIII

That ROGER R. RUTCOSKY and other interested

persons at BIG BEND COMMUNITY COLLEGE had telephone conversations and communications with DR. ARVIL N. BUNCH and other responsible officials representing the Army re the submitted PREP Proposal.

XXXIV

That on or about October 28, 1971, pursuant to its solicitation letter of 21 July 1971 and based on the contents and merits of the responsive PREP Proposal submitted by BIG BEND COMMUNITY COLLEGE which was "compiled and authored" by ROGER R. RUTCOSKY, the Army selected BIG BEND COMMUNITY COLLEGE to implement its PREP Proposal as an educational program.

XXXV

That but for the PREP Proposal "compiled and authored" by ROGER R. RUTCOSKY, the Army would not have selected BIG BEND COMMUNITY COLLEGE to institutionally implement PREP. Important considerations in the implementation of the PREP Proposal are the facilities, the history, and the ability of BIG BEND COMMUNITY COLLEGE to meet the institutional requirements of the services.

XXXVI

That on or about October 28, 1971, the Army accepted ROGER R. RUTCOSKY'S PREP Proposal and agreed to contract with BIG BEND COMMUNITY COLLEGE for

educational services. Further, on or about November 9, 1971, the Army and BIG BEND COMMUNITY COLLEGE entered into an Educational Services agreement. This agreement does not contain a "warranty against contingent fees" provision either by amendment or otherwise.

XXXVII

That on or about November 30, 1971, ROGER R. RUTCOSKY, discontinued his job as a Counselor in the Special Services Program.

XXXVIII

That on December 1, 1971, ROGER R. RUTCOSKY and BIG BEND COMMUNITY COLLEGE entered into a standard employment contract entitled "Predischarge Education Program Community College Employment Contract," wherein BIG BEND COMMUNITY COLLEGE hired ROGER R. RUTCOSKY as the "Director of Instruction of Predischarge Education Program in Germany," at a salary and for a liquidated sum of Nine Thousand Four Hundred Fifty Dollars ($9,450.00) for seven (7) months.

XXXIX

That ROGER R. RUTCOSKY left for Europe to implement the PREP Program on December 2, 1971; and in February of 1972, while in Germany, ROGER R. RUTCOSKY met with DR. WALLENSTIEN and again confirmed

his agreement and understanding with DR. WALLENSTIEN that he was to receive a percentage of the generated revenues for use of the PREP Proposal and ROGER R. RUTCOSKY at this time agreed to take five percent off the top of the gross monies being received; DR. WALLENSTIEN recalls this conversation in February of 1972 and DR. WALLENSTIEN indicated he would take it up with his attorneys when he got back to the United States.

XL

That when he returned from Germany after his visit in February of 1972, DR. WALLENSTIEN took this matter up with attorneys representing the Office of the Attorney General, and the college Board of Trustees.

XLI

That on or about March 1, 1972, all key employees of BIG BEND COMMUNITY COLLEGE, including ROGER R. RUTCOSKY, in the PREP Program Europe were offered but did not accept a stipend of Two Thousand Dollars ($2,000.00) by BIG BEND COMMUNITY COLLEGE as an extra reward or bonus for their pioneering efforts to implement PREP. This in no way constituted a unique offer or form of payment to ROGER R. RUTCOSKY for his previous specific work product, the PREP Proposal, but on the contrary the same amount was offered to each

individual who initially went to Europe under ROGER R. RUTCOSKY'S direction. The offer was to include an assignment of all of ROGER R. RUTCOSKY'S rights and interests in the PREP Proposal, an offer which was unacceptable to ROGER R. RUTCOSKY.

XLII

That DR. ARVIL N. BUNCH, who was the agent representing the Army with respect to the PREP Program Europe, on February 29, 1972, over Department of the Army letterhead, and in answer to a letter from ROGER R. RUTCOSKY dated 16 February 1972, and other inquiries by ROGER R. RUTCOSKY calling attention to the Army of his copyright of the PREP Proposal and the alleged unauthorized use of the PREP Proposal, stated: "We (the Army) are in no way involved in your agreement with BIG BEND."

XLIII

That while he was in Europe, after February, 1972, and after receiving the buy out offer letter of March 9, 1972 from BIG BEND COMMUNITY COLLEGE, ROGER R. RUTCOSKY sent letters to several interested persons at BIG BEND COMMUNITY COLLEGE and in the Army, regarding his concern over his direct financial participation in the revenues being generated by the PREP Program as conducted in Europe, that is, demand for a percentage of the action; and

subsequently thereafter he was discharged on June 22, 1972.

XLIV

That the methododology and sequence of payment by the individual student G.I., after he or she has enrolled in the PREP Program and is taking or has taken courses, is as follows:

1. Each individual student G.I., at or on about enrollment, signs and executes a reporting form supplied by the Veteran's Administration entitled: Serviceman's Application for Pre-Discharge Education Program (PREP) (VA Form 22-1990p or 22-2990 or their equivalent) which lists inter alia the courses enrolled in and credit hours taken; and
2. Each individual G.I. student, at or on about enrollment, signs and executes a "power-of-attorney" which empowers BIG BEND COMMUNITY COLLEGE to endorse the VA check in favor of the college; and
3. BIG BEND COMMUNITY COLLEGE periodically submits these VA course enrollment reporting forms for each individual

G.I. student to the Veterans Administration in Washington, D.C.; and

4. The Veterans Administration, based on these reporting forms, cuts or draws a check in the name and favor of the individual veteran, thereby releasing to the individual G.I. student earned and vested educational entitlement monies; and
5. The Veterans Administration sends the check made out to the individual G.I. student to BIG BEND COMMUNITY COLLEGE; and
6. BIG BEND COMMUNITY COLLEGE exercises its "power-of-attorney" obtained from each separate serviceperson to endorse the VA benefit check and thereafter deposit the amount of the check to the account of BIG BEND COMMUNITY COLLEGE, Moses Lake, as "local funds"; and
7. BIG BEND COMMUNITY COLLEGE thereafter writes a "receipt" to each individual G.I. student evidencing the payment by the student G.I. for the educational

services rendered by BIG BEND COMMUNITY COLLEGE.

XLV

That implementation of the educational ideas and concepts of the PREP Proposal, compiled and authored by ROGER R. RUTCOSKY, was progressively done by stages as the program got under way and reached full momentum and operation.

XLVI

That the efforts of ROGER R. RUTCOSKY heretofore mentioned on behalf of BIG BEND COMMUNITY COLLEGE, was the catalyst not only for the initial selection of BIG BEND COMMUNITY COLLEGE to implement PREP as a program, but constitutes the on-going catalyst for the performance by BIG BEND COMMUNITY COLLEGE of educational efforts in this specific area for the military.

XLVII

That the main thrust of the PREP Proposal, as compiled and authored by ROGER R. RUTCOSKY, that is, the opportunity to offer educational services leading to a high school diploma through the unique application of educational concepts in an innovative form is directly traceable to the ideas and concepts contained in the original work product of ROGER R. RUTCOSKY as submitted in the PREP Proposal to the

Army.

XLVIII

That this effort on behalf of BIG BEND COMMUNITY COLLEGE by ROGER R. RUTCOSKY was a tremendous benefit to BIG BEND COMMUNITY COLLEGE both directly and indirectly, and in comparison of the status to the school before the PREP Proposal is an overwhelming financial and status improvement.

XLIX

From the outset both ROGER R. RUTCOSKY and the College knew and understood that the initial phase of the PREP Program would continue for at least 18 months and that if the program proved successful it would continue indefinitely subject to approval by the Army and the institution concerned.

L

That the potential for expansion of the PREP Proposal as an educational program was specifically referred to by the Army in its 21 July 1971 solicitation letter, and by BIG BEND COMMUNITY COLLEGE in its September 24, 1971, letter which transmitted to the Army the PREP Proposal, "compiled and authored" by ROGER R. RUTCOSKY.

LI

That the PREP Proposal as an educational program has expanded, that is, initially from the Army's

Eighth Division, Europe, to other Army divisions and units in Europe, to the Air Force's divisions and units in Europe, as well as to the Navy's divisions and units in Europe.

LII

That the involvement of the Army, and subsequently of the Air Force and the Navy, is attributable to the PREP Proposal of ROGER R. RUTCOSKY as implemented as a program by BIG BEND COMMUNITY COLLEGE.

LIII

That the original Army solicitation letter of July 21, 1971, was directed to BIG BEND COMMUNITY COLLEGE, not to ROGER R. RUTCOSKY; that the Educational Service Agreement of November 7, 1971, wherein BIG BEND COMMUNITY COLLEGE was selected to offer the PREP Proposal as a program, was between the Army and BIG BEND COMMUNITY COLLEGE, not ROGER R. RUTCOSKY; and that other Educational Service Agreements, or their equivalents (twx or letters) subsequently were entered into between BIG BEND COMMUNITY COLLEGE, and the Army, Air Force and Navy, and not between these branches of the Armed Forces and ROGER R. RUTCOSKY: that all monies and revenues generated and received for implementation of the PREP Proposal and program have been paid by the individual

student G.I.s to BIG BEND COMMUNITY COLLEGE, and not to ROGER R. RUTCOSKY.

LIV

That the testimony relating to gross revenues generated by the PREP Proposal came basically through the testimony of Mr. Fall, the state auditor. That his testimony and reports would indicate that beginning April 1972 through December 31, 1975 total PREP revenues from U.S. servicemen were received in the amount of $10,442,872.00. Of the total amount of generated revenues the college is investing approximately 54 percent (or $5,639,151) in instructional services and 17 percent (or $1,775,288) in Central administration in Europe.

LV

That the State of Washington by and through the agency of BIG BEND COMMUNITY COLLEGE is the holder of all revenues and monies generated or received from the PREP Program.

LVI

That ROGER R. RUTCOSKY is entitled to compensation beyond that which he received from BIG BEND COMMUNITY COLLEGE as "direction of instruction, PREP Europe"; that ROGER R. RUTCOSKY did not enter into an agreement to write and compile and author the PREP Proposal only on the basis of a promise of an employ-

ment position in the program.

LVII

That there was not only an agreement and understanding between ROGER R. RUTCOSKY and the lawful agent and president of BIG BEND COMMUNITY COLLEGE, DR. WALLENSTIEN, that ROGER R. RUTCOSKY would receive a position in the PREP Program in the event his PREP Proposal was approved by the Army and implemented by BIG BEND COMMUNITY COLLEGE, but also an agreement and understanding that ROGER R. RUTCOSKY would receive a percentage of the generated revenues.

LVIII

That the value of the services rendered by ROGER R. RUTCOSKY will diminish and be diluted with the passage of time because ROGER R. RUTCOSKY no longer is an active participant in the PREP Program.

LIX

That ROGER R. RUTCOSKY, on August 2, 1974, filed this action based on recovery for use of his intellectual work product and property within three (3) years from the date the causes of action arose, that is, on or after January 1, 1972, pursuant to R.C.W. 4.16.080 (3); ROGER R. RUTCOSKY filed his claims with the State Auditor on September 20, 1974.

CONCLUSIONS OF LAW

I

That the Court has jurisdiction over the named Plaintiffs and Defendants in this action.

II

That the employment contract between BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY, dated December 1, 1971, wherein ROGER R. RUTCOSKY was hired as "Director of Instruction, PREP Europe," sets forth a sum certain, that is, a salary of Nine Thousand Four Hundred Fifty Dollars ($9,450.00), as compensation paid to liquidate amounts owing for the day-to-day services of ROBERT R. RUTCOSKY (sic) for BIG BEND COMMUNITY COLLEGE, and therefore this amount does not constitute full satisfaction, as a matter of law or equity, of the claims of ROGER R. RUTCOSKY re the use and implementation of his PREP Proposal by BIG BEND COMMUNITY COLLEGE.

III

That the Congress of the United States statutorily authorized the PREP Program pursuant to 38 U.S.C. §§ 1695 et seq. which states, inter alia, that its purpose is to provide G.I.s "with an opportunity to enroll and pursue a program of education and training prior to their discharge or release from active duty with the Armed Forces;" that the PREP Program is

administered by the Veterans' Administration and is conducted with the cooperation and in coordination of the Department of Defense.

IV

That the PREP Proposal, compiled and authored by ROGER R. RUTCOSKY and which content-wise is a plan of education that contains, inter alia, his unique application of a combination of educational ideas and theories and concepts brought together in an innovative form, is the "intellectual work product and property" of ROGER R. RUTCOSKY, and consequently constitutes a recognizable proprietary interest protectible by law; that the PREP Proposal has no literary, artistic, or intrinsic value other than vis-a-vis use and implementation to enroll and educate qualified and interested G.I.s by any capable educational institution or agency, that is, use and implementation of intellectual work product and property is the precise interest of ROGER R. RUTCOSKY which is legally protectible in this particular case.

V

That there exists a contract, express as well as implied-in-fact, between BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY for ROGER R. RUTCOSKY to "compile and author" a PREP Proposal for and on behalf of BIG BEND COMMUNITY COLLEGE which would

satisfy the requirements of the 21 July 1971 Army solicitation letter in order that BIG BEND COMMUNITY COLLEGE would be selected by the Army to implement the submitted PREP Proposal as an educational program in Europe vis-a-vis enrolling qualified and interested G.I.s as students in courses which instructionally could lead to a high school diploma.

VI

That with respect to this contract, express as well as implied-in-fact, between BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY for ROGER R. RUTCOSKY to "compile and author" a PREP Proposal for and on behalf of BIG BEND COMMUNITY COLLEGE, etc., there was no meeting of the minds and therefore no agreement as to exactly what form or amount of consideration or compensation was to be paid by BIG BEND COMMUNITY COLLEGE to ROGER R. RUTCOSKY for his endeavors, although consideration or compensation in some form and amount was definitely within the contemplation of the parties.

VII

That there exists an implied-in-law contract (quantum meruit) between BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY, running in favor of ROGER R. RUTCOSKY and against BIG BEND COMMUNITY COLLEGE, in order to prevent BIG BEND COMMUNITY COLLEGE from

being unjustly enriched due to the use and implementation as a program of the intellectual work product and property of ROGER R. RUTCOSKY contained in his PREP Proposal.

VIII

That there are substantial equitable considerations underlying this case, particularly in light of the constant and continuing stringent duty owed by the State (BIG BEND COMMUNITY COLLEGE) in its conduct towards ROGER R. RUTCOSKY -- a fiduciary duty of trust, scrupulously fair dealings, good faith, fairness (not the morals of the marketplace), which support theories of promissory estoppel against BIG BEND COMMUNITY COLLEGE estopping it from disclaiming payments to ROGER R. RUTCOSKY.

IX

That equitable considerations also require and necessitate that a remedy be fashioned by the Court which will ensure fair and just treatment of ROGER R. RUTCOSKY, past, present and in the future.

X

That ROGER R. RUTCOSKY shall receive as reasonable compensation for the past and on-going use as well as implementation by BIG BEND COMMUNITY COLLEGE of his intellectual work product and property contained in the PREP Proposal, and be awarded as

damages, a royalty based upon the gross revenues received by BIG BEND COMMUNITY COLLEGE from PREP Europe; furthermore, this royalty -- after reviewing and evaluating the amounts of gross revenues received by BIG BEND COMMUNITY COLLEGE for its implementation of the PREP Proposal as a program as reported by the State Auditor up through June 30, 1974, and taking into consideration the fact that the value of the services rendered by ROGER R. RUTCOSKY will diminish and be diluted with the passage of time because ROGER R. RUTCOSKY no longer is an active participate (sic) in the PREP Program -- is determined by the Court to be five percent (5%) of the gross revenues for a period of five (5) years from the date of "inception" of the PREP Proposal, compiled and authored by ROGER R. RUTCOSKY, as an educational program by BIG BEND COMMUNITY COLLEGE for the military, which shall be measured, inasmuch as implementation is by stages, by the date first revenues were or are being received from the individual G.I.s assigned to each separate company (or other similar-size military unit) who were or are enrolled in PREP; and that ROGER R. RUTCOSKY shall continue to receive a royalty at a rate of two and one-half percent (2-1/2%) for an additional five (5) years thereafter.

XI

That BIG BEND COMMUNITY COLLEGE should have ninety (90) days from the date of the Judgment to pay ROGER R. RUTCOSKY damages accumulated to this day, with interest thereon at six percent (6%) per annum; and BIG BEND COMMUNITY COLLEGE shall have sixty (60) days after the rendering of each fiscal year report to pay to ROGER R. RUTCOSKY, any monies owing to him as indicated above. Any damages and/or monies not paid within said sixty (60) day period will bear interest at eight percent (8%) per annum.

XII

That ROGER R. RUTCOSKY shall be entitled to conduct a periodic audit and/or accounting, at his own cost and expense, to verify said annual gross revenues as reported by BIG BEND COMMUNITY COLLEGE; furthermore, BIG BEND COMMUNITY COLLEGE shall fully cooperate in said audit and/or accounting by making available all relevant books and records and accounts, receipts and tabulations, etc., for inspection and copying, at all European sites where PREP is being implemented as well as Moses Lake, Washington.

XIII

That R.C.W. 28B.50.094, Program for Military Personnel -- Costs of Funding, provides re PREP: "The costs of funding programs authorized by R.C.W.

28B.50.092 through 28B.50.094 shall ultimately be borne by grants or fees derived from nonstate treasury sources."

XIV

That the Judgment hereunder, based on implied-in-law (quantum meruit), implied-in-fact, express contract, and promissory as well as equitable estoppel, shall:

1. Run against BIG BEND COMMUNITY COLLEGE, and its successors, assigns, transferrees, etc., as well as against any person(s) or entity(ies) who use or implement, directly or indirectly, in any form or manner whatsoever, the intellectual property and work product of ROGER R. RUTCOSKY, as contained in the PREP Proposal, to educate military personnel; and
2. Be payable out of any and all revenues and/or monies generated or received by BIG BEND COMMUNITY COLLEGE, et al., for implementation of the PREP Proposal as a program, and also shall be payable out of the State treasury inasmuch as by law BIG

BEND COMMUNITY COLLEGE is an instrumentality and agency of the State of Washington and furthermore the PREP Program and issuance of a State qualified and approved High School Diploma thereunder is statutorily authorized and sanctioned. R.C.W. 28B.50.092-094.

XV

That members of the Board of Trustees, officers and employees of BIG BEND COMMUNITY COLLEGE, are not liable in law or in equity, personally for any of their actions or admissions.

XVI

That DR. WALLENSTIEN and other officers and employees of BIG BEND COMMUNITY COLLEGE re PREP were acting in their representative capacities for and on behalf of BIG BEND COMMUNITY COLLEGE, all with the knowledge and consent of BIG BEND COMMUNITY COLLEGE Board of Trustees which expressly as well as impliedly authorized, and even through acquiesence (sic) ratified, BIG BEND COMMUNITY COLLEGE'S participation in PREP Europe -- from authorizing DR. WALLENSTIEN to take whatever actions and steps were necessary to respond to and therefore satisfy the requirements of the Army's 21 July 1971

solicitation letter in in (sic) order for BIG BEND COMMUNITY COLLEGE to be selected to offer and implement an approved PREP Proposal, to and through, approval of the expansion of that implementation for the Air Force and Navy -- and consequently the college is bound by the acts and commitments of these various individuals re PREP Europe.

XVII

That the November 9, 1971, Educational Services Agreement entered into between the Army and BIG BEND COMMUNITY COLLEGE is, in substance and effect, a grant of permission or license or franchise for BIG BEND COMMUNITY COLLEGE to offer and hold out its Army-approved PREP Program, as set forth in the PREP Proposal submitted by BIG BEND COMMUNITY COLLEGE in response to the 21 July 1971 Army solicitation letter, to individual G.I.s who elect whether or not to accept those services by enrollment in PREP and therefore each becomes as a student personally and individually liable to BIG BEND COMMUNITY COLLEGE for the services rendered.

XVIII

That, inter alia, the non-inclusion of a "warranty against contingent fee" in the November 9, 1971, Educational Services Agreement presumptively was both intentional and purposeful and

lawfully omitted by the Army contracting personnel; since it was written and issued by the Army, the document cannot be presumed to be any less of an instrument than it was as drafted and sent to BIG BEND COMMUNITY COLLEGE by the Army and subsequently signed and executed by BIG BEND COMMUNITY COLLEGE and the Army.

XIX

That, inter alia, kinds of contracts, 10 U.S.C. §2306(b), 32 C.F.R. §6.103-20, Exec. Order No. 9001, etc., are not penal laws nor do violations amount to illegality per se.

XX

That as a matter of law the communications, for example telephone conversations BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY had with the Army respecting their response to the Army's letter of July 21, 1971, regarding the kind of PREP Proposal being solicited by the Army and subsequently the PREP Proposal which was submitted for consideration by BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY, did not amount to or result in the exercise or use of any improper means or undue influence by ROGER R. RUTCOSKY, and therefore no pollution of the public or private honesty or integrity of responsible Army officials like DR. ARVIL N. BUNCH occurred.

XXI

That the alleged defense of "illegality" of contract between BIG BEND COMMUNITY COLLEGE and ROGER R. RUTCOSKY, under 10 U.S.C. §2306(b), 32 C.F.R. §7.103-20, Exec. Order 9001, etc. is not supported by sufficient evidence in the record to warrant conforming the Defendants' pleadings to the proof pursuant to CR 15(b) since, more particularly, illegality of a contract will not be presumed and defendants have not met the burden of proof of showing by a preponderance of the evidence in the record, which must be substantial and not a mere scintilla, that either in fact or law there was an "illegal" contract.

XXII

That no privity or legal relationship or duties, contractual or otherwise, and therefore, no liability or accountability exists or existed between ROGER R. RUTCOSKY and the Army, or Air Force, or Navy, with respect to the implementation of the PREP Proposal as a program.

XXIII

That all parties necessary and proper and indespensable (sic) to complete and full adjudication of all matters presented to this Court, based upon the causes of action and theories of recovery

as well as defenses thereto plead and raised in this action, were before the Court.

XXIV

That failure of the Plaintiff to file within two (2) years, after January 1, 1971, with the State Auditor his claims hereunder pursuant to R.C.W. 43.09.160, is not a jurisdictional bar to maintaining this lawsuit sounding in breach of contract and quantum meruit inasmuch as (1) application of R.C.W. 43.09.160 would deny Plaintiff equal protection of the law contrary to WASH. CONST. art. 1, §12 and U.S. CONST. amend. 14 since it would vary the general statute of limitations of three (3) years of R.C.W. 4.16.080(3) which Plaintiff met; (2) PREP Program revenues are local funds and are not monies deposited in the state treasurey (sic); (3) PREP educational Program is a governmental and sovereign function; (4) filing of a claim with the State Auditor is not specifically required under R.C.W. 43.09.160 as a condition precedent to maintaining a lawsuit; (5) the State equitably is estopped because of knowledge and notice of and actions taken by the State on Plaintiff's claims within the two (2) year period; and (6) the continuing breach of legal obligations by the State on which sums are due and payable offers a continuing opportunity for ROGER R. RUTCOSKY, which

he perfected on September 20, 1974, to file his claims with the State Auditor.

XXV

That the Court incorporates, whether heretofore set forth as Findings of Fact or Conclusions of Law, its Memorandum of Decision dated October 31, 1975.

DONE IN OPEN COURT this 5th day of January, 1977.

Harold D. Clarke

HAROLD D. CLARKE, Judge

APPENDIX D

EDUCATIONAL SERVICE AGREEMENT

1. Scope. This agreement entered into on the 9th day of Nov. 1971, between the United States of America, hereinafter called the "Government," represented by the Contracting Officer, and Big Bend Community College, an education institution located at Moses Lake, Washington, hereinafter called the "Contractor," is for educational services to Government personnel who qualify under Sections 1695 - 1697, Title 38, United States Code, as amended. The parties intend that the Contractor shall provide instruction and counseling in accordance with regulations prescribed by the Administrator of Veterans Affairs and the Department of the Army with standard offerings of courses similar to those available to the public and shall receive payment from the enrolled students or Veterans Administration, as appropriate, for services rendered in accordance with the Contractor's schedule of tuition and fees applicable to the public and in effect at the time the services are performed. This Educational Service Agreement is intended by the parties to fulfill the requirement of Veterans Administration Regulation 14260(A)(2)(b).

2. Amendment. This agreement may be amended only by mutual consent of the parties.

3. Review. The Government will review this agreement annually before the anniversary of its effective date for the purpose of incorporating changes required by Statutes, Executive Orders or other directives; such changes will be evidenced by a modification to this agreement or by a superseding agreement. If the parties fail to agree upon any such changes, the Government shall terminate this agreement.

4. Duration. This agreement shall commence on the effective date above and shall continue until terminated.

5. Services To Be Provided. a. The Contractor shall provide a course of instruction which will qualify Government personnel who qualify under sections 1695 - 1697, Title 38, United States Code, as amended, for a secondary school diploma. Such course of instruction shall be in accord with regulations prescribed by the Administration of Veterans Affairs and the Department of the Army. Upon completion of the requirements for a secondary school diploma, Contractor will issue the same to the student without any charge therefor.

b. The Contractor shall also provide deficiency, remedial or refresher course or courses required for or preparatory to the pursuit of an appropriate

course or training program in an approved educational institution or training establishment. Such course or courses shall be provided to Government personnel who qualify under sections 1695 - 1697, Title 38, United States Code, as amended, and shall be in accord with regulations prescribed by the Administrator of Veterans Affairs and the Department of the Army.

c. The Contractor shall also provide a course of instruction which will qualify Government personnel who qualify under Title 38, United States Code, for an Associate in Arts or Associate in Science degree. Upon completion of the requirements for such degree, Contractor will issue same to the student without any charge therefor. (The Associate of Arts program is not a part of PREP).

d. The Contractor shall promptly deliver to the Contracting Officer one copy of each catalog applicable to this agreement and one copy of any subsequent revisions thereto.

6. Payments. a. The Contractor shall be responsible for collecting all charges for instruction from the student.

The Department of the Army shall have no responsibility for the payment of any appropriated or nonappropriated funds under this agreement and

shall, under no circumstances, be responsible for payment of any tuition, charges, fees, or other payments hereunder.

b. The Contractor shall have the right to change any tuition and fees, provided that the Contractor publishes such revisions in a catalog or otherwise publicly announces such revisions and applies them uniformly to all students pursuing the same or similar curricula as Government students enrolled under the agreement. The Contractor shall provide the Contracting Officer notice of such changes prior to their effective date.

7. Withdrawal. In the event a student withdraws from a course or courses of instruction under this agreement, the Contractor shall provide notification of such withdrawal to the appropriate local GED officials within one week of withdrawal.

8. Transcripts. The Contractor will obtain the high school transcripts for all soldier participants whose records indicate previous high school attendance. Within a reasonable period of time after withdrawal of a student for any reason, or after graduation, the Contractor shall send to the student or his designee one copy of an official transcript showing all work by the student at the Contractor's institution until such withdrawal or graduation.

9. Termination of Agreement. a. Either party may terminate this agreement by giving one hundred and twenty days advance written notice of the effective date of termination. In the event of termination, the Government shall have the right, at its option, to continue to require educational services until completion of the school term.

b. Termination by either party shall not be the basis for any claim by the Contractor against the Government.

10. Logistical Support. The Government shall provide logistical support designated in Appendix A to this agreement. The Government shall provide as much advance notice as possible in the event it cannot supply all or a part of the logistical support. If all or a part of the logistical support is terminated, the Contractor may revise his tuition charges and fees, but termination of all or a part of such logistical support shall not be considered as a breach of this agreement and shall not obligate the Government to pay the Contractor any appropriated or nonappropriated funds by reason of such termination of logistical support.

11. Definitions. a. The word "term" means the period of time into which the Contractor divides the academic year for purpose of instruction; this

includes "semester," "trimester," "quarter," or any similar word the Contractor may use.

b. The word "course" means a series of lectures or instructions, and/or laboratory periods, relating to one specific presentation of subject matter, such as Elementary College Algebra, German 401, or Surveying. Normally a student completes a course in one term and receives a certain number of semester hours credit (or equivalent) upon successful completion.

c. The word "curriculum" means a series of courses having a unified purpose and belonging primarily to one major academic field. It will usually include certain required courses and elective courses within established criteria. Examples include Business Administration, Civil Engineering, Fine and Applied Arts, and Physics. A curriculum normally covers more than one term and leads to a degree or diploma upon successful completion.

d. The word "catalog" means any medium by which the Contractor publicly announces terms and conditions for enrollment in the Contractor's institution, including tuition and fees to be charged. This includes "bulletin," "announcement," or any other similar word the Contractor may use.

e. The word "tuition" means the amount of

money charged by an educational institution for instruction, not including fees as defined below.

f. The word "fees" means those applicable charges directly related to enrollment in the Contractor's institution. This shall not include any permit charge (e.g. parking, vehicle registration or charges for services of a personal nature (e.g. food, housing, laundry)).

g. The word "charge" means payments for services other than tuition or fee.

h. The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

12. Conflicts Between Agreement and Catalog. To the extent of any inconsistency between the provisions of this agreement and any catalog or other document incorporated in this agreement by reference or otherwise or any of the Contractor's rules and regulations, the provisions of this agreement shall govern.

13. Examination of Records. The Contractor agrees

that the Government or any of its duly authorized representatives shall, until expiration of three years after the termination of this agreement, have access to and the right to examine any books, documents, papers and records of the Contractor, that directly pertain to, and involve transactions relating to this contract on subcontracts hereunder.

The remaining portions of the Agreement are:

14. Equal Opportunity. Standard equal opportunity boiler-plates.

15. Disputes. Standard provisions regarding disputes.

IN WITNESS WHEREOF, the parties hereunto have executed this agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA

By: /s/ R. F. ASKEY

R. F. ASKEY

Colonel, AGC

Dir. Army Educ & Morale Spt

CONTRACTOR

By: /s/ ROBT J.WALLENSTIEN, President

Robert J. Wallenstien, President

Big Bend Community College

Moses Lake, Washington 98837

APPENDIX A

TAB III - Logistic Support Authorized by USAREUR Regulation 700-28

1. Classroom space and office space with repair and utilities, non-reimbursable
2. Clerical assistance from education centers within current support capabilities
3. Intra-theater Class A telephone service, reimbursable
4. Customs exemption (USAREUR Regulation 550-175)
5. Legal Assistance (USAREUR Regulation 608-80)
7. Housing, permanent, reimbursable (USAREUR Regulations 220-13 and 210-14); not available - family housing offices will provide usual assistance given to military personnel seeking housing on economy
8. Housing, temporary BOQ and transient billets, faculty and administrative staff (USAREUR Regulation 210-13); when available
9. DD Form 1173 (Uniformed Services Identification and Privilege Card USAREUR Regulation 606-10 and AFR 30-20)
10. European Exchange Service (EES) privileges (USAREUR Regulation 60-10 and USAFE Regulation 147-3)
11. Class VI privileges (USAREUR Regulation 230-70

and USAFE Regulation 147-3)

12. Commissary privileges (USAREUR Regulation 31-200 and AFR 145-15)
13. Local recreational facilities to include clubs, open messes, theaters, craft shops, libraries, and similar activities (AFR 34-42 and USAFE Regulation 34-2)
14. Laundry and dry-cleaning facilities (USAREUR Regulation 210-130 and AFR 148-1)
15. Use of bathing facilities
16. Medical services in accordance with AR 40-3, AFR 168-7); emergency services expected and other services available on a reimbursable basis
17. Use of Dependents' Schools (AR 350-290 and USAREUR Regulation 621-321) Space-available, tuition-paying category; on tuition basis
18. United States Forces Registration for privately-owned vehicles
19. POL purchase privileges where motor vehicle registration has been accomplished (USAREUR Regulation 700-231 and USAFE Regulation 67-94)
20. Armed Forces Post Office services (AR 65-10 and USAFE Regulation 182-20)
21. Armed Forces Recreation Center (USAREUR Regulation 28-110)
22. Certificate of Status (USAREUR Regulation

606-25)

23. Pets and firearms registration

APPENDIX E

UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

HUMAN RESOURCES DIVISION

8 DEC 1977

B-140300

The Honorable Max Cleland

Administrator of Veterans Affairs

Veterans Administration

Dear Mr. Cleland:

We have reviewed the financial controls exercised by the Veterans Administration (VA) over the Predischarge Education Program (PREP). We analyzed the program's financial data at nine schools and at the offices of two consultants, who were associated with some of these schools, and estimate that they accumulated $9.9 million in surplus funds.

These surpluses represent excess VA payments over cost incurred after October 1972, when legislation established reasonable cost as the basis for VA payments to PREP projects. The surpluses occurred because VA did not have sufficient financial controls to assure that such payments approximated reasonable costs. We believe that VA should recover most of these surplus funds.

VA's administration of PREP has ceased but it is scheduled to resume about 1979. It is possible

that if the program resumes as planned, duplication of effort may occur between VA's program and similar Department of Defense (DOD) programs.

BACKGROUND

The Veterans Education and Training Amendment Act of 1970 (Public Law 91-219) created PREP to provide active duty military personnel with courses for a secondary school diploma and for prerequisites for postsecondary education. The act required that VA pay PREP participants an educational assistance allowance equal to (1) the established charge for tuition, fees, books, and supplies, which the educational institution required of nonveterans of similar circumstances enrolled in the same or a similar program or (2) $175 per month for a full-time course, whichever was less.

Public Law 92-540 (Oct. 24, 1972) amended the 1970 act by authorizing VA to reimburse education or training institutions for the reasonable cost of PREP, when they did not have similar programs. The law also increased the maximum monthly payment to $220 for PREP participants.

Public Law 94-502 (Oct. 15, 1976) prohibited PREP enrollment after October 31, 1976, except for participants in the Post-Vietnam Era Veterans' Educational Assistance Program, and then only

during the last 6 months of their first enlishment. A VA official informed us that all PREP operations have now ceased. The program is not due to resume until about 1979, when servicemen again become eligible for the program. At present DOD is funding similar educational programs to replace PREP for its active duty members.

ACCUMULATED SURPLUSES

In April 1977 we requested VA's General Counsel to comment on the recoverability of two types of surpluses we found at the schools reviewed. (See enc. I.)

--PREP payments made by VA in excess of PREP costs and

--Unused PREP books, supplies, and equipment retained by schools after PREP terminated.

VA's General Counsel replied in June 1977 that both types of surpluses were refundable to the extent that they were accrued after the enactment of Public Law 92-540 and were the result of applying a fixed rate to cover reasonable PREP costs. (See enc. II.) VA and school officials informed us that all nine schools were charging a fixed rate on October 24, 1972; therefore, any surpluses accrued after that date are refundable.

Of the nine schools where we identified surpluses, four had agreements for private consultants to provide many PREP services. Consultant duties included:

--Assisting in obtaining permission to place and maintain educational facilities and personnel on military bases and vessels.

--Purchasing, warehousing, and furnishing texts, materials, and supplies.

--Developing programs.

--Training administrators and teachers.

--Maintaining offices on military bases and naval vessels.

--Maintaining a complete accounting and financial reporting system, including student registration, enrollment, and termination data.

--Preparing tuition collection, rebate, and refund reports.

For these services consultants received up to 85 percent of VA's PREP payments to the four schools.

Where consultants were involved, schools were typically responsible for (1) arranging and maintaining State and VA approval of the program; (2) maintaining academic records, including course

outlines and student transcripts; (3) supervising programs to assure maintenance of quality of instruction; and (4) hiring and compensating instructors.

Where consultants were not involved, the schools performed all of the duties cited above. The VA General Counsel's office said that since the consultants acted in place of the school, they may be subject to the same requirements as the schools; therefore, surpluses accumulated by consultants after October 24, 1972, may also be refundable.

The following table shows estimated VA payments, costs, and surpluses of the nine schools and two consultants. Some of these could not provide us with complete PREP financial data at the time we completed our fieldwork in July 1977.

Schools	Estimated Payments received	Estimated Costs incurred	Estimated Total surplus
	(000 omitted)		
American Preparatory Institute (Killeen, Tex.)	$ 4,682	$ 4,378	$ 304
Barstow Community College (Barstow, Calif.)	221	168	53
Big Bend Community College (Moses Lake, Wash.)	16,549	12,127	4,422
Concordia College (Milwaukee, Wis.)	104	32	72

Schools	Estimated Payments received	Costs incurred	Total surplus
Ft. Steilacoom Community College (Tacoma, Wash.)	$ 2,832	$ 2,768	$ 64
Gavilan Joint Community College District (Gilroy, Calif.)	1,009	782	227
Olympic College (Bremerton, Wash.)	5,619	4,614	1,005
St. Louis High School (Honolulu, Hawaii)	2,404	1,318	1,086
San Diego Community College District (San Diego, Calif.)	3,400	3,163	237
Total	36,820	29,350	7,470
Consultants			
Concordia PREP program (Bremerton, Wash.):			
at Concordia	1,263	1,251	12
ModuLearn, Inc. (San Juan Capistrano, Calif.):			
at Barstow	470	261	209
at Gavilan	2,004	1,409	595
at St. Louis	7,384	5,679	1,705
Total	11,121	8,600	2,521
Total for schools and consultants	$ 47,941	$ 37,950	$ 9,991

Surpluses at all of these schools, except Olympic College, represent reported payments received, less costs. In the case of Olympic College, however, the surplus also includes

PREP funds expended for non-PREP purposes	$ 341,000
Unused PREP inventories (at cost)	153,000
Total	$ 494,000

Expenditures for purposes other than PREP but charged to PREP included such things as TV studio equipment, cameras, stereo consoles, furniture, athletic equipment, and automotive testing equipment. Inventory consisted of such things as new and unused books, test materials, tape recorders, and self-instructional material.

VA's General Counsel advised us that since there is limited opportunity to use such PREP resources, VA would consider our suggestions on their disposition.

None of the schools' or consultants' financial records we reviewed had final financial statements for PREP expenditures. Closeout costs, such as the microfilming of PREP records and unemployment compensation for terminated PREP employees, were still being incurred at the time we completed our fieldwork. We could not accurately calculate these costs, but consultants' and school officials' estimates indicate that future closeout costs at all nine schools will not exceed a total of about $1.4 million. Also, in some cases there were substantial receiv-

ables and payables which, in the aggregate, generally offset each other but may significantly affect the surpluses of some individual schools and consultants.

Conclusions

We believe that VA should recover surplus funds accumulated after October 24, 1972, by schools and consultants participating in PREP. Any unused inventories may be of use to DOD or disposed of according to General Services Administration procedures. We believe, however, that there could be a final VA audit before seeking recovery action because in some cases, closeout costs, receivables, and payables had not been settled at the time we completed our fieldwork. These transactions should now be substantially completed.

Also since there were about 200 schools involved in PREP, there may be more surpluses than those we identified. Therefore, we believe that VA should conduct audits of these schools, as appropriate, to determine if surpluses exist. We recognize that it may not be practical to audit all schools. A decision regarding which schools to audit must be based on the potential amount of recovery and the audit resources available. Our experience indicates that a school with adequate

financial records can be audited in about 10 staff days.

Recommendations

We recommend that VA

--conduct or provide audits of the nine schools and two consultants we visited to establish the amount of recoverable surplus,

--conduct or provide audits, as appropriate, at the remaining 200 schools to identify whether additional recoverable surpluses exist,

--take action to recover those surplus funds that have been identified, and

--determine if the unused PREP inventories at Olympic College, Bremerton, Washington, can be used by DOD for its military personnel still in training or disposed of under appropriate General Services Administration procedures.

INADEQUATE FINANCIAL CONTROLS

Surpluses have been accumulated by PREP schools and consultants because VA did not exercise two essential elements of financial control to assure that payments to schools reimbursed them for only reasonable costs.

First, VA did not issue regulations limiting the types and amounts of costs that schools and consultants could charge for providing PREP services. As VA's General Counsel stated in his June 13, 1977, letter (see enc. II), the intent of Public Law 92-540 is clear--that payments for PREP should reimburse schools for reasonable costs incurred, without the schools incurring either a profit or a loss. Without the benefit of implementing regulations, schools and consultants charged their PREP accounts for a variety of types and amounts of costs.

Second, a VA official told us that VA did not make audits of schools' and consultants' financial records to determine if PREP payments equaled reasonable costs. VA officials told us that as a result, they were unaware of the amount of surpluses accumulated by some schools and consultants and did not request refunds. In the absence of periodic financial audits and requests for refunds, some school officials and consultants considered the surpluses "earned profits," "a proper reward for the risks involved," or "a surplus that is ours to keep."

Conclusions

Significant amounts of surplus funds have been accumulated by PREP schools and consultants because

VA has not (1) issued regulations defining the types and amounts of PREP costs for which reimbursement could be received and (2) made audits of schools' and consultants' financial records to determine if it was reimbursing them only for reasonable costs.

Recommendations

If PREP resumes as planned, we recommend that VA

--issue regulations which clearly define the types and amounts of PREP costs for which reimbursement will be made and

--make appropriate audits of schools' and consultants' PREP financial records to enable VA to (1) determine if there is compliance with appropriate regulations and (2) take the necessary steps to gain compliance, where lacking.

FUTURE OF PREP

VA's PREP operations have been suspended but are due to resume about 1979. In the interim DOD received congressional approval to reprogram about $50 million of its fiscal year 1977 and 1978 appropriations to expand its own high school completion and remedial education programs to replace PREP. In some cases DOD is using the same schools that were affiliated with VA.

According to Public Law 94-502, when PREP is

again implemented, it will be available only to eligible military personnel during the last six months of their first enlistment.

DOD officials informed us that they prefer their military personnel to receive PREP-type training early in their enlishment because it is more beneficial to the armed services. They, therefore, make this type of training available throughout the enlistment period.

Conclusion

If VA resumes PREP as planned, the probability exists that DOD and VA will be making similar high school completion and remedial education programs available to military personnel. DOD prefers its military personnel to not wait until the last 6 months of their first enlistment to take this type of training and, therefore, offers it throughout the enlistment period.

Recommendations

We recommend that before VA resumes operation of PREP, it determine, in conjunction with DOD, the need for it to participate in this type of program.

We also recommend that if it is determined that DOD is providing this type of training, VA develop an appropriate legislative proposal to remove

PREP from VA statutes and eliminate future VA activities in the program.

- - - - -

The contents of this report have been discussed with VA's Office of the General Counsel and representatives of the Department of Veterans Benefits. Also some of its contents have been discussed with DOD officials. The comments received have been considered in preparing this report.

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of this report.

We are sending copies of this report to the Chairmen of the House and Senate Committees on Appropriations, House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committees on Veterans' Affairs; the Director of the Office of Management and Budget; and the Secretary of Defense.

We appreciate the cooperation provided by VA officials during our review. We will be pleased to meet with your office to discuss the audit techniques we employed as well as to provide additional data on the schools and consultants holding surpluses.

Sincerely yours,

/s/ GREGORY J. AHART

Gregory J. Ahart

Director

Enclosures - 2

ENCLOSURE I

UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

HUMAN RESOURCES DIVISION

April 6, 1977

MR. Guy H. McMichael, III

General Counsel

Veterans Administration

Dear Mr. McMichael:

During our current survey of VA's Predischarge Education Program (PREP), we noted instances where schools had (1) used PREP funds for non-Program purposes, (2) Program funds and resources after Program termination, and (3) earned excessive profits from Program operations.

We request that you provide us with a statement

of VA's position on recovering such misused and surplus funds and resources. Please relate your position to the following areas noted during our survey.

--Unused general Program funds and contingency fund balances.

--Excess profits.

--Program funds and resources used for non-PREP purposes.

--Unused PREP resources on hand after Program termination, i.e., books, supplies, vehicles, typewriters, audio-visual systems, and other equipment.

We have discussed the recovery of such resources with Mr. Robert Dysland, your Deputy Assistant. Also, we have talked with Mr. John Rowsey, Department of Veterans Benefits, regarding relevant PREP regulations and guidelines.

Inasmuch as our survey is well underway, we would appreciate it if you could provide us with VA's position paper as soon as possible. If you have any questions, please contact Mr. Thomas A. Quarry at 389-5287.

Sincerely yours,

/s/ GEORGE D. PECK

George D. Peck

Assistant Director

cc: Mr. Busbee (IAS)

ENCLOSURE II

VETERANS ADMINISTRATION

OFFICE OF GENERAL COUNSEL

WASHINGTON, D.C. 20420

June 13, 1977

IN REPLY REFER TO: 021

Mr. George D. Peck

Assistant Director

Human Resources Division

United States General Accounting Office

Washington, D. C. 20548

Dear Mr. Peck:

This will respond to your letter of April 6, 1977, requesting the views of the Veterans Administration on recovery of misused and surplus funds and resources from schools who were engaged in Predischarge Education Program (PREP) education. You specifically ask for our position on the following areas:

1. Unused general Program funds and contingency fund balances.
2. Excess profits.
3. Program funds and resources used for non-PREP purposes.
4. Unused PREP resources on hand after Program termination, i.e., books,

supplies, vehicles, typewriters, audio-visual systems, and other equipment.

At the time the PREP program was enacted into law by Public Law 91-219, the Congress provided a program calling for reimbursement to the school for the cost of tuition, fees, books, and supplies. Under the provisions set forth in section 1696(b) of title 38, United States Code, the school was not permitted to make charges in excess of the established and customary charges for similarly circumstanced non-veterans. The House-Senate conferees, in their report to the House and Senate on H. R. 11959 (House Report 91-918, p. 14) stated:

> "It is the purpose of this new program to assist active duty servicemen in preparing for their future education and training by providing certain remedial and refresher-type training prior to the servicemen's discharge from service. This program permits the Administrator of Veterans' Affairs to make necessary payments directly to the serviceman, these payments being intended for reimbursement to the educational institution for the cost of tuition, fees, books, and supplies. The educational institution is not permitted

to make charges of the servicemen in excess of established and customary charges for similar circumstanced non-veterans. On the other hand, the program contemplates that participating educational institutions will be able to recoup the full, reasonable costs entailed in providing predischarge education or training. Although it is recognized that some institutions may not generally charge tuition or fees for regular courses, it seems unreasonable that such institutions would be expected to provide special programs, such as PREP, without charging enrolled students appropriately." (Emphasis supplied.)

In the enactment of Public Law 92-540, effective October 24, 1972, the Congress amended Section 1696(b) to grant the Administrator, where there was no same program, the authority to "establish appropriate rates for tuition and fees designed to allow reimbursement for reasonable costs for the education and training institution." (Emphasis supplied.) With these basic provisions of law in mind, it is our view, with respect to your first question, that unused general program funds and contingency

fund balances are subject to refund to the Veterans Administration in the same manner as excess profits/surplus accrued after the effective date of a "fixed rate" after October 24, 1972, the effective date of Public Law 92-540 cited above. We do believe, however, that a reasonable and fair interpretation should be applied in determining close-out costs as schools discontinue their programs.

Concerning excess profits/surplus accrued after October 24, 1972, in the operation of programs for which there was a "fixed rate," any such moneys should be refunded to the Veterans Administration. The cost determination leading to fixed rates was applied after that time to newly established programs or to a request for an increase in a rate which had previously been accepted as a "same program." (There were approximately 200 schools which offered PREP programs.) It is our view that the law all along has provided for reimbursement of costs. However, we also believe that the intent of the law is clear -- no profit, no loss.

The reimbursement feature of the law and control as to its application has been provided in Program Guide 21-1, Change 197 (Section M-37 dated August 13, 1973), Change 198 (Section M-42 dated September

7, 1973), and Change 208 dated October 31, 1974)(sic) (copies enclosed). The efforts of the Veterans Administration to protect the school against the contingency of unknown, but allowable expenses, was covered by Paragraph 13 of Change 208--a 5 percent contingency allowance when surplus funds from a past period were used as an offset in the rate established for a later period.

We believe that program funds and resources used for non-PREP purposes should be disallowed to the extent that they affected surplus/profit that accrued after the date of a "fixed rate," which could be as early as October 24, 1972, the date of enactment of Public Law 92-540.

Unused PREP resources on hand after program termination, i.e., books, supplies, vehicles, typewriters, audio-visual systems, and other equipment, represent a surplus in the same manner as excess profits. Because of limited opportunity for use, we would have no objection to such disposition as the General Accounting Office finds appropriate.

We hope that our views on the points you have raised in your letter will be helpful to you in your surveys of PREP schools.

Sincerely yours,

/s/ GUY H. McMICHAEL

GUY H. McMICHAEL III

General Counsel

(40666)

APPENDIX F

§ 2303. Applicability of chapter

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of the Army.

(2) The Department of the Navy.

(3) The Department of the Air Force.

(4) The Coast Guard.

(5) The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including--

(1) public works;

(2) buildings;

(3) facilities;

(4) vessels;

(5) floating equipment;

(6) aircraft;

(7) parts;

(8) accessories;

(9) equipment; and

(10) mechine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to con-

tracts for its installation or alteration.

Aug. 10, 1956, c. 1041, 70A Stat. 128; July 29, 1958, Pub.L. 85-568, Title III, § 301(b), 72 Stat. 432.

THE SUPREME COURT OF WASHINGTON

ROGER R. RUTCOSKY, ET AL,

Respondents,

v.

HAROLD L. TRACY, ET AL,

Appellants.

NO. 44716

ORDER DENYING PETITION FOR RECONSIDERATION

The Court having decided by a vote of eight to one that the appellant's petition for reconsideration should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 9th day of June, 1978.

Chief Justice

89 Wn.2d 606

IN THE

Supreme Court of the United States

78-392

October Term, 1978

DR. HAROLD TRACY, et ux.;
BIG BEND COMMUNITY COLLEGE, et al.,

Petitioners,

v.

ROGER R. RUTCOSKY and ROBERTA RUTCOSKY,
husband and wife,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SULLIVAN, MORROW & LONGFELDER
By: DANIEL F. SULLIVAN
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

DR. HAROLD TRACY, et ux.;
BIG BEND COMMUNITY COLLEGE, et al.,

Petitioners,

v.

ROGER R. RUTCOSKY and ROBERTA RUTCOSKY, husband and wife,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Roger R. Rutcosky brought this action against Big Bend Community College (hereinafter BBCC) to recover compensation for the college's use of his intellectual work product, in educational programs conducted by the college at numerous military sites. Rutcosky authored, compiled and prepared, at the request of and for the use of BBCC, a unique

and individualized educational program. The program was specially designed to meet all of the criteria set forth by the Army in its solicitation letter to BBCC requesting a proposed predischarge educational program (hereinafter PREP) for military personnel in Europe. Rutcosky's work product was ultimately utilized by BBCC, as the basis of their educational programs conducted for military personnel in Europe.

The case was tried to the Honorable Harold E. Clarke who found in favor of Mr. Rutcosky. Judgment was entered against the college only. The court concluded that

> the PREP Proposal, compiled and authored by Roger R. Rutcosky and which content-wise is a plan of education that contains, inter alia, his unique application of a combination of educational ideas and theories and concepts brought together in an innovative form, is the "intellectual work product and property" of Roger R. Rutcosky, and consequently constitutes a recognizable interest protectable by law . . . .

(Conclusion IV). The court found that "the Army accepted Roger R. Rutcosky's PREP Proposal and agreed to contract with Big Bend Community College for educational services," (Finding XXXVI) and that

BBCC implemented the PREP program to its financial benefit.

The court based the judgment on the following alternative legal theories: (1) equitable estoppel; (2) promissory estoppel; (3) express contract; (4) implied in fact contract; and (5) quantum meruit.

The court found that the intent and understanding of the parties was that BBCC would compensate Rutcosky "for use of his intellectual work product" (Finding XVII) and concluded that "consideration or compensation in some form and amount was definitely within the contemplation of the parties" (Conclusion VI). The court further concluded that "there was no meeting of the minds and therefore no agreement as to exactly what form or amount of consideration or compensation was to be paid by Big Bend Community College to Ruger R. Rutcosky for his endeavors." (Conclusion VI). The court therefore fashioned an equitable remedy

> for the past and on-going use as well as implementation by Big Bend Community College of his intellectual work product and property contained in the PREP Proposal, and . . . awarded, as damages, a

> royalty based upon the gross revenues received by [BBCC] from PREP Europe . . .

(Conclusions IX and X). Since Rutcosky prevailed on his common law actions in state court, he voluntarily dismissed an action in federal court for infringement of statutory copyright.

On March 11, 1977, the trial court amended the judgment, extending the royalty to include revenues generated from a related but allegedly non-PREP agreement between BBCC and the Army.

BBCC appealed directly to the Washington State Supreme Court from both judgments. That court unanimously affirmed both judgments in an opinion filed on February 2, 1978. Rutcosky v. Tracy, 89 Wn.2d 602, 574 P.2d 382 (1978). The college's petition for reconsideration was denied on June 9, 1978. BBCC then applied to this Court for an order staying the mandate of the Washington State Supreme Court. That application was denied by Justice Rehnquist on July 3, 1978.

JURISDICTION

Respondents submit that this case presents no substantial federal question and that this court

therefore lacks jurisdiction over the matter. This contention is amplified infra.

QUESTIONS PRESENTED

A. Does this action by a private individual against a state college involving his right to be compensated for the use of his intellectual work product present a substantial federal question where: (1) the court's judgment was grounded on the alternative legal theories of estoppel, quantum meruit, infringement of common law copyright and express contract? and (2) the amount and form of compensation for the the use of the intellectual work product was fashioned by the court in the exercise of its equitable powers?

B. Does this action by a private individual against a state college present a substantial federal question where 10 USC § 2306(b) grants only the U.S. government certain rights against a contractor and does not purport to delineate the rights and obligations between the contractor and a third party?

C. Does 10 USC § 2306(b) necessarily void a contract between a college and a private individual which contemplates that the latter will be paid for the use of his intellectual work product when: (1) the college in fact utilizes that work product in performing educational service agreements for military personnel? (2) The trial court explicitly found that no contingent fee agreement existed between the college and the individual for the latter to solicit or obtain the agreement for the college? (3) The court explicitly ruled and the college agrees that no undue influence or improper means was involved?

D. Does 10 USC § 2306(b) apply to an agreement between the Army and the college when the agreement provides: (1) the Army grants to the college a license only to provide educational services to the GI's? (2) there shall be no financial obligation by the Army to pay for the services provided by the college to the GI's? (3) that any financial obligation to the college for providing the educational

services shall be the sole responsibility of the individual GI receiving the services? (4) that no warranties against contingent fees are included in the agreement which itself was drafted by the Army?

STATUTES INVOLVED

The statute which BBCC contends raises a federal question in this case is 10 USC § 2303 and 2306(b). The college contends it violated the statute by entering into what it characterizes as a contingent fee agreement with Mr. Rutcosky. The pertinent provisions read in part:

> § 2303 Applicability of Chapter
> (a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies . . . of all property . . . and all services, for which payment is to be made from appropriated funds.
>
> § 2306 Kinds of Contracts
> (b) Each contract negotiated under § 2306 of this title shall contain a warranty, . . . that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or a contingent fee, except a bona fide employee or established commercial or selling agency maintained by him

> to obtain business. If the contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or the contingency from the contract price or consideration.

A related regulation, 41 CFR § 1-1.507(3) (1971), provides that a warranty against contingent fees is not required if the Army is not contractually bound to pay more than $25,000.00.

Additionally, this case involves Public Law 91-219 (38 USC § 1695-1698), which authorized the creation of PREP.

STATEMENT OF FACTS

The trial of this case involved factual disputes between Mr. Rutcosky and BBCC. On October 31, 1975 Judge Clarke entered his Memorandum Opinion which was subsequently incorporated into the court's final Findings of Fact and Conclusions of Law by Conclusion XXV. In the Memorandum Opinion, Judge Clarke stated, inter alia:

> It is this court's opinion, as indicated, that the product produced by RRR [Roger R. Rutcosky] falls into the category of an idea that was manifested in the finished work product. It appears that the courts in this area generally protect what might best be called common law copyright.

> In this connection, some type of a royalty seems to be the most equitable method of compensation if there has been an infringement or appropriation of the work product or idea. In this regard, the court is cognizant of the fact that protection under a copyright runs for a limited period of time. I am not implying that we are bound by copyright law in this particular case, however . . . It appears to the court based upon all of the circumstances and factors presented, that RRR is entitled to a royalty based upon the gross revenues received from the PREP Proposal by BBCC.

It was subsequent to the court's memorandum opinion that BBCC, clearly based upon the equitable remedy of a royalty fashioned by the court, first raised the defense of illegality under 10 USC § 2306(b) by filing a "Trial Amendment to Defendant's Answer." The trial court then ordered additional hearings on the matter where the evidence was again reviewed both orally and by written briefs. At the conclusion of these hearings, the court, by way of its Conclusion of Law XXI, denied the motion on the grounds that there was no evidence supporting the defense of illegality:

> [T]hat the alleged defense of "illegality" of contract between Big Bend Community College and Roger R. Rutcosky, under 10 USC § 2306(b), 32 CFR § 7.103-20, Exec. Order 9001, etc. is not supported by sufficient

> evidence in the record to warrant conforming the defendant's pleading to the proof pursuant to CR 15(b) since, more particularly, illegality of a contract will not be presumed and defendants have not met the burden of proof of showing by a preponderance of the evidence in the record, which must be substantial and not a mere scintilla, that either in fact or law there was an "illegal" contract.

Discontented with the trial court's disposition of the illegality issue, BBCC has attempted to relitigate the issue. First in the Washington Supreme Court and now in this Court. It does so by making sweeping statements concerning contingent fees, solicitation and even negotiation by Mr. Rutcosky in a futile attempt to bring the Rutcosky/BBCC agreement within the proscription of the federal statute. The statements are not supported by the record in any respect and are in fact contradicted by the trial court's unchallenged Findings of Fact and Conclusions of Law. Without citation to the record, Findings of Fact or Conclusions of Law, BBCC advises this Court that both courts below ruled that BBCC and Rutcosky entered into an enforceable contingent fee agreement. Petitioner's Brief, pp. 2, 3, 12, 19.

In fact, the record discloses that the trial court expressly found to the contrary. That is, no contingent fee agreement existed (Finding of Fact XVIII, unchallenged on appeal):

> That BIG BEND COMMUNITY COLLEGE did not employ or retain ROGER R. RUTCOSKY and therefore did not agree to pay him a commission, percentage, or contingent fee, to solicit or secure a contract with the Army.

BBCC also characterizes Rutcosky as a "negotiator" and implies that he contracted with BBCC to negotiate and solicit the educational services agreement (hereinafter ESA) which BBCC entered into with the Army. There is no Finding of Fact or Conclusion of Law evidenced in the record that Rutcosky contracted with BBCC to negotiate with the Army. Likewise, there is no Finding of Fact or substantial evidence indicating that Rutcosky did, in fact, negotiate with the Army on behalf of the college with respect to the PREP or any other ESA. Unchallenged finding of fact XVIII, supra, states to the contrary. The only findings of fact that in any way related to Mr. Ruitcosky's contacts with the Army were also unchallenged on appeal and fall

far short of showing any contract with BBCC or attempts by Mr. Rutcosky to negotiate with the Army. They read:

> Finding of Fact XXXII:
> That by letter dated October 7, 1971, to Roger R. Rutcosky, Paul T. Kunkle, Safeguard Education Officer, requested further information from Roger R. Rutcosky re the submitted PREP proposal.
>
> Finding of Fact XXXIII:
> That Roger R. Rutcosky and other interested persons at Big Bend Community College had telephone conversations and communications with Dr. Arvil N. Bunch and other responsible officials representing the Army re the submitted PREP proposal.

Clearly, Rutcosky was never employed on a contingent fee basis within the contemplation of the statute nor was he a negotiator as BBCC implies. In fact, BBCC at all times denied that there was any agreement or contract between itself and Rutcosky. It further denied and denies up to the present date that it has at any time utilized Rutcosky's intellectual work product in the performance of its educational services for GI's or other servicemen in the context of the PREP program or any other ESA's. The distorted statement of facts offered by BBCC does require

respondent to further acquaint this Court with the relevant background of the case.

Rutcosky went to BBCC in September 1970 to teach English from September 1970 to June 12, 1971 (Findings IV and V). He had previously graduated from Bemidgi College in Minnesota, earning a BA in American Studies which is a blend of American Literature and American Social Intellectual History (RP 100; 248). He had also done post-graduate work at the University of Kansas in behaviorial sciences and minority problems (RP 100).

In June 1971, Rutcosky enrolled for the fall term at Washington State University to obtain a Masters Degree in Literature (RP 105-106). After BBCC's regular session ended on June 12, 1971, the college re-hired him as an English instructor for the summer session commencing June 14, 1971 and ending July 23, 1971 (Finding VI).

Concerned with the failure of BBCC's curriculum to attract students within its district, Rutcosky began to think about suggesting a unique alternative program which would do so (RP 156). Therefore, on July 26, 1971, he approached Dr.

Robert Wallenstien, the president of BBCC, to ascertain if state research funds were available for developing his ideas (Finding X). No research funds were available but Wallenstien showed Rutcosky a letter from the United States Army to BBCC dated July 21, 1971.

In this letter, sent to numerous colleges and universities throughout the United States, the Army "competitively solicited proposals that would conceptualize an imaginative, resourceful and flexible Pre-Discharge Education Program (PREP) to provide instruction and study for GI's in the Eighth Division Germany, to earn and receive a high school diploma." (Finding IX). Prior to the Rutcosky/Wallenstien meeting of July 26, BBC had not planned to respond to the Army solicitation letter and had not attempted to do any work in response to the Army solicitation letter. (Finding XIII). However, after Rutcosky had expressed his interest in developing unique ideas for education programs (without any personal knowledge of the letter from the Army), Wallenstien solicited and authorized Rutcosky to compile and author a PREP

proposal in accordance with the criteria expressed in the Army solicitation letter (Finding XV).

Rutcosky delivered a draft of his proposal to Wallenstien in the first week of September 1971 (Finding XXV). Wallenstien reviewed it, was pleased, and made no corrections (R 405). This 87-page PREP proposal contained a point-by-point response to the criteria of the Army solicitation letter (Finding XXI), and "as compiled and authored . . . was the exclusive work product of Roger R. Rutcosky." (Finding XXII). On September 24, 1971, BBCC transmitted Rutcosky's PREP proposal to the Army (Finding XXVIII). On October 28, 1971, the Army selected BBCC to offer its educational program to American GI's in Europe. That selection was based on the contents and merits of the proposal which was compiled and authored by Rutcosky (Finding XXXIV). On November 9, 1971, the Army and BBCC entered into an ESA (Finding XXXVI) granting BBCC permission to offer a PREP program to GI's.

Rutcosky's intellectual work product has proven to be a remarkable educational success and the program has expanded from the Army's Eighth

Division in Germany to other Army Air Force and Navy divisions and units throughout Europe. (Finding XLVIII; LI) (RP 591).

REASONS FOR DENYING THE WRIT

A. This Action by Rutcosky to Recover Compensation From BBCC for Its Use of His Intellectual Work Product Presents No Substantial Federal Question and This Court Accordingly Has No Jurisdiction

Where a judgment is (Berea College v. Kentucky, 211 U.S. 45, 53 L. Ed. 81, 29 Sup. Ct. 33 (1908), Fox Film Corp. v. Muller, 296 U.S. 207, 80 L. Ed. 158, 56 Sup. Ct. 183 (1935), Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed 789, 65 Sup. Ct. 459 (1945), Wilson v. Loew's Inc., 355 U.S. 597, 2 L. Ed. 2d 519, 78 Sup. Ct. 526 (1958)), or might have been based upon an adequate and independent state ground (Stembridge v. Georgia, 343 U.S. 541, 96 L. Ed. 1130, 72 Sup. Ct. 834 (1952); Durley v. Mayo, 351 U.S. 277, 100 L. Ed. 1178, 76 Sup. Ct. 806 (1956); Black v. Cutter Laboratories, 351 U.S. 292, 100 L. Ed. 1188, 76 Sup. Ct. 824 (1956)), this Court lacks jurisdiction over the case.

1. The trial court's judgment awarding Rutcosky compensation for BBCC's use of his intellectual work product was based in part upon the additional legal theories of infringement of common law copyright, quantum meruit and estoppel, with the court employing its equitable powers to fashion a remedy--this basis of the judgment is adequate and independent from any potential federal issue arising out of an alleged contingent fee contract

Judge Clarke based the judgment on the alternative theories of infringement of common law copyright, quantum meruit, and estoppel. 10 USC § 2306(b) applies only to contingent fee contracts to solicit or obtain a government contract. Insofar as the judgment is based on the use of an intellectual work product, infringement of common law copyright, estoppel, or quantum meruit, no federal statute is even tangentially applicable and no federal question is presented. The Washington State Supreme Court has long recognized the right of an individual to be compensated for the use of his intellectual work product. Ryan & Associates v. Century Brew Ass'n., 185 Wash. 600, 55 P.2d 1053 (1936).

With respect to compensation, the court itself fashioned an equitable remedy on a royalty basis,

not because the court concluded that the parties had so agreed, but because the court thought a royalty would be the fairest. Judge Clarke explained:

> I have felt from the conclusion of the case after a reasonable time to consider it that Mr. Rutcosky had produced a product for which he had not been compensated and that the Court, based upon the evidence, should arrive at some fair method and basis of paying Mr. Rutcosky for a product that was used to the benefit of Big Bend Community College. My opinion still hasn't changed in that respect. That remains the same.
>
> . . .
>
> I want to be candid. I didn't frankly have much problem with that in my mind right or wrong. I did have a great deal of problem, and it caused me a lot of concern, as to how that should be handled, that is, compensation to Mr. Rutcosky. I don't know whether the method that I have used is what someone else is going to say is correct. Maybe I should have decided that the work product was worth "X" number of dollars. And forgotten about the overriding royalty. I think there is a basis for doing that because we have "X" number of revenues generated to date, and a reasonable prognosis is that there will be a certain amount generated in the future. I think I could have gone that way. I chose to go this way because I felt in all fairness to all parties, Rutcosky would receive money only so long as the college received money. The other way is a little more chancy and risky in my opinion because I could order an amount, and all of a sudden the program could stop tomorrow.

(RP 888-889). Thus the overriding royalty was a method of compensation chosen by the court. Regardless of whether BBCC's liability was based on infringement of common law copyright, estoppel, quantum meruit or express contract, the court's fashioning of an equitable remedy to compensate Rutcosky for the use of his intellectual work product draws no federal question into this case.

2. Assuming arguendo that the sole ground of decision was express contract, the determination of what effect to accord a possible violation of 10 USC § 2306(b), as that violation affects the rights and obligations between BBCC and Mr. Rutcosky, is solely a matter of state law

Initially, respondent concedes that 10 USC § 2306(b) presents a federal question insofar as the issue is: (1) whether that statute applies to an agreement between the Army and BBCC; or (2) whether BBCC violated that statute; or (3) what remedies are available to the government should it choose to assert any rights against BBCC for violation of that statute. (In the latter regard, neither the Army nor the VA has ever claimed that BBCC violated 10 USC § 2306(b)).

As such, respondent concedes that whether BBCC was compensated for its services from federal or non-federal funds is a federal question (Respondent does not concede that the Washington State Supreme Court's comments on that issue merit review by this court.) Here, however, BBCC does not simply seek review of that issue. The college also asks this court to delineate the rights and obligations between a party allegedly contracting with the government (BBCC) and a third party (Rutcosky). Assuming that such parties contract on a contingent fee basis for the third party to solicit a governmental contract, BBCC asks this Court to rule that the contingent fee contract between the governmental contractor and the third party is void per se even if no undue influence is employed. In this regard 10 USC § 2306(b) on its face does not purport to define any such rights and obligations; the statute concerns only the relationship between the government and a party contracting with it. In short, BBCC asks this Court to determine, by common law standards, the enforceability of a private contract.

However, where litigation is purely between private parties and does not impact upon the rights, duties or significant interests of the United States, the legal issue is to be determined by state law. Bank of America Nat'l. Trust & Savings Ass'n. v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 1 L. Ed. 2d 93 (1956); cf. United States v. Yazell, 382 U.S. 341, 15 L. Ed 2d 404, 86 Sup Ct. 500 (1966). Accordingly, respondent submits that the enforceability of any contract between BBCC, a college, and Rutcosky, a Washington citizen, is a matter of state law and poses no substantial federal question.

B. The Judgments Below Were Correct and The Record in This Case is Peculiarly Ill-suited for Reviewing the Issue of Illegality Since BBCC Did Not Raise the Defense Until After Entry of the Trial Court's Memorandum Opinion, and the Record Itself is Bereft of Any Evidence Establishing a Violation of 10 USC § 2306(b)

For the prohibition of 10 USC § 2306(b) against contingent fees to apply, BBCC must prove that: (1) BBCC retained Rutcosky on a contingent fee basis; (2) Rutcosky was retained by BBCC to "solicit or obtain" a contract with the Army; (3)

the Army "negotiated" a "contract to purchase" services from BBCC; and (4) payment for such services was to be made from "appropriated funds." The Washington State Supreme Court addressed only requirement number four but the record and findings of fact reveal that BBCC failed to prove any of these elements and 10 USC § 2306(b) is simply inapplicable.

The lack of evidence on the issue was understandable because BBCC did not plead the illegality defense prior to or during trial. At trial, the college denied the existence of any contract between itself and Rutcosky. The alleged violation of 10 USC § 2306(b) was first raised as an afterthought after the trial court entered its memorandum opinion. After additional special hearings and extensive briefing, the court denied BBCC's motion and entered Conclusion of Law XXI, unchallenged on appeal, that there was no evidence to warrant conforming the pleadings to the proof under Washington law.

1. The trial court expressly found that Rutcosky was not retained by BBCC on a contingency basis

Unchallenged finding of fact XVIII, supra, establishes that Rutcosky was not retained by BBCC on a contingency basis to obtain a governmental contract. Moreover, Judge Clarke's comments, supra, establish that the court itself chose a royalty rather than a lump sum payment as the method for compensating Rutcosky out of considerations of equity and fairness. Surely, the fashioning of an equitable remedy by a judge to fairly compensate Rutcosky for the use of his intellectual work product by BBCC cannot be held to violate 10 USC § 2306(b).

2. There is no evidence in the record that BBCC retained Roger Rutcosky to "solicit or obtain" a government contract--hence § 2306 is inapplicable

A fundamental distinction exists between soliciting a government contract and performing services in connection with the preparation of a bid for governmental business. Browne v. R & R Engr. Co., 264 F.2d 219 (3d Cir. 1959). There, Browne knew of a corporation which had been awarded

Atomic Energy Commission contracts and which was about to seek bids on subcontracts. Browne encouraged the defendant R & R to bid on these subcontracts. He agreed to use his acquaintances with various persons to obtain a place for the defendant on the invitational list of bidders. Brown also assisted in preparing drawings, estimates and technical data required for bidding and, later, assisted in reorganizing R & R and attempting to obtain financing for it. It was understood that payment to him was contingent upon R & R obtaining one or more subcontracts. Ultimately, R & R obtained a series of subcontracts. The trial court concluded that Browne's contract with R & R violated Executive Order 9001 (the predecessor of § 2306) and therefore denied recovery.

The Third Circuit reversed, distinguishing a person hired to solicit a government contract from a person employed to perform services in preparation of bids for a government contract. The former is illegal; the latter is not. The court observed:

> [T]here was much more to the services [plaintiff] Browne bargained to render and did render than this obtaining of a listing. He performed technical work requiring engineering skill. He prepared estimates and other data. He worked on some administrative problems.
>
> . . .
>
> To us it seems clear that this work involved no more "soliciting or securing" a contract than would the work of a typist who puts bids in final form or a photographer who had taken pictures in support of a bid, or even a bondsman who had supplied a performance bond. When both the language of Executive Order 9001 and the evils of improper influence at which it aims are considered, it seems a proper conclusion that the technical performance of engineering, technical and administrative work involved in the preparing of cost estimates, bidding data and specifications on a contingent fee basis is not contrary to law or public policy.

The court held that only the plaintiff's work in obtaining eligibility for R & R to bid for contracts was illegal and allowed full recovery on a quantum meruit basis for all other services which the plaintiff performed to the defendant's benefit.

If the performance of engineering, technical and administrative work in the preparation of contract bids on a contingent fee basis is not contrary to law, certainly it would seem that Rutcosky's preparation of an educational program

for BBCC to transmit to the Army would not be illegal. This would be particularly true as Rutcosky, unlike Browne, was neither retained by the college "to solicit or obtain" nor did he in fact solicit, or obtain a contract for BBCC with the Army (see Finding of Fact XVIII, supra).

However, there is inherent in the Rutcosky case an additional substantial distinction which clearly sets it apart, even from the Browne case. The gravamen of Rutcosky's claim was not for compensation for developing a program to be used by BBCC in securing the ESA agreement or agreements but in BBCC's use of his intellectual work product in the performance of BBCC's ESA agreements on behalf of military personnel. One must continue to view this case in terms of the context of the factual issues presented at the trial. In that context BBCC denied any agreement with Rutcosky whatsoever. Further, BBCC denied that it had ever used Rutcosky's intellectual work product at any time in the performance of its educational programs for servicemen under any of its ESA agreements. In

fact, BBCC continues, at this very date, to deny that it is using in any form or context, modified or otherwise, any of Rutcosky's intellectual work products in any of its educational programs. The trial court found against BBCC and in favor of Rutcosky on these important, essential factual issues. The Washington State Supreme Court affirmed the trial court's Findings and Conclusions on these essential factual issues in every respect. Counsel for the respondent Rutcosky would submit that the United States Supreme Court is not a proper forum to relitigate factual issues.

3. The Army did not negotiate a "contract to purchase" property or services from BBCC--hence § 2306 is inapplicable

The Army/BBCC ESA demonstrates that the Army did not contract to purchase property or services within the meaning of 10 USC § 2306(b) since the Army incurred no monetary obligations and, in fact, disclaimed any obligation to pay BBCC for its educational services to GI's. Paragraph 6 of the ESA provided:

(a) The contractor shall be responsible for collecting all charges for instruction from the student.
(b) The Department of the Army shall have no responsibility for the payment of any appropriated or nonappropriated funds under this agreement and shall, under no circumstances, be responsible for payment of any tuition, charges, fees, or other payments hereunder.

(Emphasis added.)

That the Army did not "contract" with BBCC to purchase "services" is further illustrated by the method adopted for compensating BBCC. Unlike other military programs, payment to BBCC under PREP was the sole responsibility of the individual GI, not the Army. Upon enrollment for PREP, each GI signed a Veterans Administration form which listed inter alia the credit hours taken and also signed a power of attorney authorizing BBCC to endorse the GI's VA check in favor of the college. The VA then issued and sent to BBCC a check in the name of the GI which BBCC then cashed by exercising its power of attorney. BBCC then issued a receipt to each GI, which evidenced payment by that GI for BBCC's educational services (Finding XLIV). See also 38 USC. § 1696(a); 38 USC § 1780(d).

Plainly, the Army did not "contract" with BBCC to purchase "services" within the meaning of § 2306(a). More precisely, as admitted by President Wallenstien (RP 67), the Army simply granted BBCC a license to operate the PREP program in Europe. The only "contract" for educational services was between BBCC and the individual GI's who enrolled in the program. The Army was not obligated to pay BBCC anything and, accordingly, the ESA, although it did not contain a warranty against contingent fees, was not illegal. See also, 41 CFR § 1-1.507(3) (1971) (warranty against contingent fees not required if Army not obligated to pay more than $25,000).

4. Payment to BBCC for its services was not from "appropriated funds"--hence § 2306 is inapplicable

An "appropriation" is (1) a statutory authorization, (2) to make payments out of the United States Treasury, (3) for a specified purpose. See § 21, Bureau of the Budget Circular No. A-34 (July 1957); 31 USC § 16.65(c)(1). See also Department of the Army, Procurement Law, 40 (1961). In some military educational programs, the military pays

the college directly from the appropriated funds. Under such programs, federal regulations require that the ESA contain a warranty against contingent fees. See A.P.P. 4-5401-5404 (located at 4 CCH Gov't Contracts Reporter at 28,373-28,374). However, under PREP the individual student, not the military, pays the college from earned VA education benefits (Finding XLIV--unchallenged). Once the VA benefit checks are drawn in favor of the GI, they become the vested property in the GI. Porter v. Aetna Casualty & Surety Co., 370 U.S. 159, 8 L. Ed. 2d 407, 82 S. Ct. 1231 (1962). As such, these educational benefits become private funds belonging to the GI. It is the GI who contracts with BBCC and who is obliged to pay BBCC. Manifestly, the college is compensated from the GI's in private funds and not from appropriated funds.

C. This Private Dispute is Not of Broad Public Import and Presents No Significant Federal Issues That Are Likely to be Recurring

Petitioners insist that there lurks in this case an important issue of federal law which this court must settle. In fact, however, the issues

here as previously discussed were and are fundamentally factual and do not warrant additional review by this Court.

To buttress the importance of the case, BBCC states, although there is no evidence of such in the record, that 200 schools which have offered PREP programs have received nearly 48 million dollars. That unverified statement represents a naked effort to persuade the Court that substantial public monies are at stake. However, this case involves one school, BBCC, and one man, Mr. Rutcosky. Assuming, arguendo, that 199 other schools offer PREP programs, there is certainly no indication that their ESA's were obtained through any alleged illegal contingent fee arrangements nor that these schools were using the intellectual work product of an individual without properly compensating him. Strangely, BBCC offers no citation to any other pending litigation. It is suspected that none exists.

BBCC also attempts to magnify the importance of this case to itself by inaccurately suggesting that it is on the "horns" of some undefined "federal-state dilemma." Sole reliance for this

contention is placed on the exceedingly fragile basis of three hearsay letters between the General Accounting Office (GAO) and the Veterans Administration (VA), which are not a part of the record of this case. In any event, respondent perceives no "dilemma" confronting BBCC which warrants review by this court of the lower courts' decisions. BBCC's problems with the VA, if any, involve alleged improper overcharges and are irrelevant and not related to the college's legal obligations to Rutcosky, particularly since the VA has never contended that the college's obligation to Rutcosky is illegal. Certainly, the VA's rights, if any, and Mr. Rutcosky's rights are not mutually exclusive. Even assuming that the payments to BBCC for its PREP services were from "appropriated funds," (as BBCC states the VA "implicitly" considers them to be) this would not alter the result herein for the reasons stated previously, i.e., unchallenged findings of fact that Rutcosky was not retained on a contingency basis and that Rutcosky did not solicit, negotiate or obtain a contract with the Army. In short, BBCC's alleged personal "dilemma,"

which supposedly necessitates review by this Court, is neither important nor real.

CONCLUSION

Had the court fashioned a lump sum award as an equitable remedy for Mr. Rutcosky, 10 USC § 2306(b) would not be applicable. However, because the judge chose to compensate Mr. Rutcosky with a royalty based upon a percentage of the gross revenues, BBCC alleges that it entered into an illegal contingent fee agreement with Rutcosky. This allegation of illegality, with the attendant innuendos of underlying albeit undisclosed corruption, was first raised after the trial was over and after the judge had found in favor of Mr. Rutcosky. This afterthought should be treated for what it is--a belated attempt by the college, without factual foundation, to avoid its legal and ethical responsibilities to a person whose personal efforts bestowed upon the college "overwhelming financial and status improvement." (Finding XLVIII). The record itself is devoid of any evidence establishing the elements to render 10 USC

§ 2306(b) applicable to this case. It is at least odd that the college characterizes its relationship with Rutcosky as illegal although the Army has never done so and although BBCC remains active in offering military educational programs to American GI's.

Again, it is important to keep in mind that Rutcosky's claim for compensation and the court's judgment awarding him compensation against BBCC in this case were in no way based on a claim for services rendered BBCC in securing a contract or agreement but, to the contrary, Rutcosky's claim in the court's judgment was based solely on the use by BBCC of Rutcosky's intellectual work product in the performance of its various educational programs. BBCC could have escaped liability by the simple expedient of ceasing to use Rutcosky's intellectual work product in their educational programs. When viewed from this perspective, one perhaps can better understand the inherent fairness and equity of the remedy finally fashioned by the

trial court which the appellant would have this court overturn.

It is respectfully submitted that certeriori be denied.

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